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**LA THÈSE A ÉTÉ  
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THE CONSORTIUM OMNIS VITAE  
AS A JURIDICAL ELEMENT OF MARRIAGE

by

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A dissertation submitted to the  
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## BIOGRAPHICAL NOTE

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## ABBREVIATIONS

A.A.S.	Acta Apostolicae Sedis
C.I.C.	Codex Iuris Canonici
C.L.D.	Canon Law Digest
D.D.C.	Dictionnaire de droit canonique
D.T.C.	Dictionnaire de théologie catholique
E.I.C.	Ephemerides iuris canonici
I.D.E.	Il diritto ecclesiastico
I.C.	Ius canonicum
M.E.	Monitor ecclesiasticus
PL	Patrologia latina (Migne)
Periodica	Periodica de re morali canonica liturgica
R.D.C.	Revue de droit canonique
R.E.D.C.	Revista española de derecho canonico
S.R.R. Dec.	Sacrae Romanae Rotae Decisiones seu sententiae

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## INTRODUCTION.

There has emerged in recent years an apparently new element in the Church's legal structure of marriage, an element identified by the expressions communio vitae, communitas vitae coniugalis, consortium omnis vitae, and similar terms. These expressions purportedly describe an aspect of marriage which has not, it is said, been adequately taken into account in the traditional canonical formulations of the nature of marriage, namely the personal dimension of the marital society. More precisely, the consortium vitae and its equivalent terms have been used to refer to marriage, or a dimension of marriage, as something more than a pro-creative institution characterized by - in addition to its ordering to the generation and education of children - the properties of exclusivity and indissolubility.

As the terms "consortium", "communio", and "communitas" indicate, the emphasis of this new jurisprudential approach is on the "unitive" aspect of marriage, that is, the union of the spouses themselves, although without prejudice to others who rightfully participate in and directly benefit from that union, namely the offspring of the marriage. Furthermore, this union is understood to be different from all other close associations of man and woman in that it is

"marital", of the sort that can exist (as far, at least, as the law is concerned) only between persons who are husband and wife.

The expression consortium vitae was given legal significance in a Rotal decision dated February 25, 1969, written by Msgr. Lucien Anné. The following year the sentence was published in the periodical Ephemerides Iuris Canonici; and since that time the notion has been taken up not only in the Roman Rota, but also in the local matrimonial jurisprudence of a number of countries. There are indications also that the new code of canon law will recognize the concept.

While the notion of consortium omnis vitae has already given rise to some shorter studies, a number of aspects of the idea remain to be explored. The purpose of the present investigation is to attempt to answer two questions about the consortium as a juridical element of marriage, questions which have apparently not yet been studied at much length. First, what are the historical precedents, if indeed there are any, of the consortium vitae within theological and (especially) canonical tradition? Secondly, what exactly is the present state of development of the concept in canon law and Roman jurisprudence?

The investigation of the first question will entail an examination of the Roman-law origins and meaning of the terms currently being used to identify this "personal

dimension" of marriage; of the teaching of St. Augustine on the nature of marriage; of the classical canonico-theological understanding of marriage, especially that of the twelfth and thirteenth centuries. Also to be studied are the formulations and underlying suppositions of the Codex Iuris Canonici on the juridical nature of marriage, along with the relevant magisterial statements and the jurisprudence which relied upon or developed the teaching of the Code.

The second question, that of the current status and alleged juridical significance of the consortium omnis vitae, involves a study of the marriage teaching of Vatican Council II (frequently cited as providing the major impetus for ascribing canonical value to the consortium) and subsequent relevant magisterial teaching. Likewise to be examined is the place given to the consortium in the preliminary drafts of the new canon law and in the post-conciliar jurisprudence of the Roman tribunals.

Is there justification for assigning juridical value to the consortium omnis vitae as an element of marriage? The ultimate aim of this study is to suggest an answer to this question and in doing so to contribute in some way to the clarification of one of the more important and (to judge by the eagerness with which the notion has been taken up in some quarters) one of the more interesting canonical questions of the day.

## CHAPTER I

### SOURCES OF THE DOCTRINAL ANALYSIS OF CHRISTIAN MARRIAGE

The beginnings of Christian speculation about marriage are practically contemporaneous with the beginning of Christian theology itself. The earliest ecclesiastical writers had several basic points of departure for their doctrine, incomplete as it was. First of all there was the natural experience of marriage: it was a normal and universal human event, although marriage practices varied from place to place. Of prime importance, of course, was the teaching of the Scriptures, Old and New Testament. The New Testament particularly, while offering no developed doctrine about the relationship of man and wife, made several clear statements about the permanency of marriage (the sayings of Jesus) and the compatibility of the married state with the profession of Christianity (St. Paul).

Still, it was not difficult to detect within the same New Testament a somewhat ambivalent attitude to marriage. Jesus invited men to celibacy for the sake of the Kingdom; human relationships were of secondary importance when compared to the demands of discipleship ("Whoever loves father or mother ... more than me is not worthy of me" - Mt. 10); children of the resurrection do not marry (Mk. 12, Lk. 20).

St. Paul is at least equally ambivalent. Christian marriage reflects Christ's union with his Church, a "great foreshadowing" (Eph. 5). Still, virginity is preferable; the married person is necessarily distracted from total concern for the things of God; sexual relations between man and wife are more by concession than command: it is better to marry than to be on fire (1 Cor. 7).<sup>1</sup>

For purposes of the present investigation two early formulations of thought on the nature of marriage are particularly noteworthy. One is the legal system (though not exclusively legal) of the Romans; the other is the theological synthesis of St. Augustine. Each of these achievements, in its own way, would leave a mark on the Catholic theology and canon law of marriage for hundreds of years. St. Augustine, the first - and for centuries the only - great Western theologian of marriage, would influence practically all future attempts by churchmen to understand and analyze the nature of Christian marriage, especially through his famous schema of the three "goods" - bona - of marriage. Roman law on its part would eventually provide the solution as to whether it is the copula or the consensus which makes a marriage (one of the most vexing questions of the medieval

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<sup>1</sup> See W. Molinski, "Marriage", in Sacramentum Mundi, Vol. 3, pp. 392-393.

canon law), thus determining in part the juridical object of matrimonial consent. In addition Roman law was to furnish much of the terminology with which both theology and canon law would define, study, and theorize about Christian marriage. Specifically, the term consortium omnis vitae together with practically all its legal equivalents are expressions of Roman law.

#### 1. Marriage in Roman Law.

##### a) Distinctive Traits of Roman Marriage.

Marriage for the Romans was more a de facto than a de jure affair. That is to say, there were relatively few aspects of marriage which were regulated by law.<sup>2</sup> There were, for instance, no prescribed legal form for Roman marriage and no required ceremonies. The condition of spouses under the law was not greatly different after they were husband and wife than before (except in the case of marriage with manus, to be mentioned later). Gifts between husband and wife were void; there was an obligation of fidelity (at least on the part of the wife), a community of domicile and name - although the wife did not always take her husband's name; and certain

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<sup>2</sup> See, for instance, H. Jolowicz and B. Nicholas, Historical Introduction to the Study of Roman Law, pp. 114-115.

claims between husband and wife were excluded.<sup>3</sup> But in general the civil effects of matrimony were few: the ordering of the personal side of married life was left to social custom. On the other hand the law was necessarily concerned with the status of offspring, their rights of inheritance, and the like. Thus it was that Roman marriage was also a legal institution: the children's position in law was in great part determined by the validity or invalidity of the parents' marriage (and in early times by the type of marriage).<sup>4</sup>

Still, the position of the Roman wife was a uniquely elevated one in antiquity. In fact if not in law she was the equal of her husband. She shared in his social status, his titles of honor; his home was hers (though without benefit of "community property" laws). She possessed honor matrimonii, the social dignity of the woman in a legitimate marriage.<sup>5</sup> Unlike the Grecian wife, for instance, she had

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<sup>3</sup> See F. Schulz, Principles of Roman Law, pp. 147-148.

<sup>4</sup> See W. Buckland, A Text-Book of Roman Law from Augustus to Justinian, p. 106. The procreation of offspring, of "legitimate children", was from the beginning one of the fundamental purposes of Roman marriage: liberorum quaerendorum causa. See, inter alios, A. Ehrhardt, "Nuptiae", in Real-Encyclopädie der classischen Altertumswissenschaft, Vol. 17-2, col. 1482.

<sup>5</sup> A. Berger, Encyclopedic Dictionary of Roman Law, p. 402, s.v. "Concubinatus".

"first place" in the home; and classical literature has left examples of the singular respect accorded the Roman domina.<sup>6</sup>

As is well known, Roman marriage was consensual in nature; that is, it came about primarily as the result of a will act, the intention of the parties to accept each other as man and wife. Ordinarily a ceremony, often elaborate, accompanied the nuptiae. Quite frequently there occurred the domum deductio, the bringing of the bride to the house of the bridegroom, whereby was symbolized the control of the husband over the wife. But this does not seem to have been a requirement for a valid marriage: the parties could already have been living together; the groom could in fact go to the bride's home; or the man could be absent and arrange that the bride be received at his residence by another. At any event, it was not an external formality which itself produced a marriage, but the marital intent of the parties.<sup>7</sup>

It was this marital intent which distinguished matrimonium from all other forms of cohabitation. Roman law

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<sup>6</sup> See, for instance, H. Insadowski, "Quid momenti habuerit christianismus ad ius romanum matrimoniale evolvendum", in Acta Congressus iuridici internationalis ... Romae 12-17 novembris 1934, tom. 2, pp. 71-72; and especially F. Schulz, Principles of Roman Law, pp. 193-196.

<sup>7</sup> See W. Buckland, op. cit., p. 112; H. Jolowicz and B. Nicholas, op. cit., pp. 114-115.

contained no prohibition of concubinage, concubinatus; but this and other man-woman relationships were juridically distinct from marriage (even though concubinatus was frequently conceived of as a monogamous and permanent union).<sup>8</sup> Likewise the Romans rather clearly differentiated between marriage and betrothal, a distinction which would prove more troublesome for the early scholastic canonists.<sup>9</sup>

Roman marriage was monogamous. One might have a concubine, or several, or might cohabit indiscriminately; but one could not possibly have more than one spouse. And marriage was, in principle, permanent. It is not entirely unremarkable, in view of the well-documented practice of free divorce among the Romans, that both socially and legally marriage was of necessity entered with a view to a life-long union.<sup>10</sup> But it is indisputably the case. A marriage in

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8 A. Berger, loc. cit.

9 J. Gaudemet, "Originalité et destin du mariage romain", in L'Europa e il diritto romano. Studi in memoria di Paolo Koschaker, Vol. 2, pp. 514 ss.

10 Divorce, like marriage, took place without the intervention of the State. No strict grounds were needed. But neither was divorce simple separation. What was required was not that the parties merely cease living together, but that they intend to put an end to the marriage. If the decision to divorce were unilateral (as it could well be), this would normally have to be declared to the other spouse. H. Jolowicz and B. Nicholas, op. cit., pp. 117-118, 235.

## SOURCES OF THE DOCTRINAL ANALYSIS

which the partners lacked the intention to form a permanent consortium was, at least in principle, no marriage at all. Affectio maritalis, a basic element of intent to marry, which identified the relationship of a man and woman as truly matrimonial and excluded every other type of living arrangement between them, had perforce as its object the other person as one with whom one intended to form a life-long conjugal society. The possibility of divorce did not affect, in this respect, the nature of marriage.<sup>11</sup>

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10 (cont'd) While divorce was legally permissible, this is not to say that it was always socially acceptable. In early Rome divorce was rare and exceptions censured. In time, however, the incidence of divorce increased, sometimes to the accompaniment of a declining morality in general. See, for instance, P. Corbett, The Roman Law of Marriage, pp. 133-146.

B. Nicholas, An Introduction to Roman Law, pp. 85-86, states: "Until the later years of the Republic [Republic: 510 B.C. to 27 B.C.] this total freedom of divorce was kept in check by public opinion and by the Roman habit of consulting a family council before making any important decision [...]. By the last century B.C., however, divorce had become a matter of course, at least among the upper classes, for whose habits alone we have any evidence."

11 A. Berger, op. cit., p. 356, s.v. "Affectio maritalis", writes: "[Affectio maritalis] presumes the intention of living as husband and wife for life and of procreating legitimate children."

And see ibid., p. 578, s.v. "Matrimonium"; also P. Corbett, The Roman Law of Marriage, p. 92. For a brief analysis of the use of "maritalis affectio" by the Roman jurists and the occasional emotional content of the expression, see J. Noonan, "Marital Affection in the Canonists", Studia Gratiana 12. Collectanea Stephan Kuttner II, 1967, pp. 486-489.

## b) The Roman-Law Definitions of Marriage.

Of particular interest to this study are the celebrated definitions of marriage in Roman law. Though it can be argued<sup>12</sup> that we have more correctly two versions of a single definition, it is customary to speak of two definitions, that of Modestinus (or that of the Digest of Justinian) and of the Institutes (of Justinian). Their importance in the present context derives first from the use made of them by the Scholastic theologians and canonists (as well as the post-Scholastics, all of which to be seen later), and secondly from the fact that their language, expressly or equivalently, is the language of current law and jurisprudence on the notion of marriage as a consortium vitae.<sup>13</sup>

The definition of the Digest, identified as being that of the jurist Modestinus, is the following:

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12 It is the argument, for instance, of J. Gaudemet, "La définition romano-canonique du mariage", in Speculum iuris et Ecclesiarum. Festschrift für Willibald Plöchl zum 60. Geburtstag, pp. 107-114.

13 This is clearly shown by U. Navarrete, "De iure ad vitae communionem: observationes ad novum Schema canonis 1086 #2", in Periodica, 66(1977), p. 263; and O. Robleda, "Riflessi romanistici nella definizione canonica del matrimonio", in Gregorianum, 56(1975), pp. 407-439.

Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuris communicatio (Digest 23, 2, 1).<sup>14</sup>

The second definition, that of the Institutes, has been attributed to Ulpian, although he is not identified there as its author:

Nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuum consuetudinem vitae continens (Institutes 1, 9, 1).<sup>15</sup>

The authenticity of the prior definition, that of Modestinus, has been challenged<sup>16</sup> as a later interpolation, possibly by Christian writers who would have added the notion of perpetuity or indissolubility ("consortium omnis vitae") and identity of religion ("divini et humani iuris communicatio"). And a Greek influence is sometimes seen.<sup>17</sup> However the majority of recent commentators hold, with reason, for

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<sup>14</sup> "Marriage is a union of man and woman and a community of the whole of life, a participation in divine and human law."

<sup>15</sup> "Marriage, or matrimony, is a union of man and woman, a union involving an undivided way of living." The literal translation of both definitions seems inevitably a little awkward.

<sup>16</sup> Notably S. Solazzi and perhaps P. Bonfante.

<sup>17</sup> See, for instance, F. Schulz, Principles of Roman Law, p. 46.

the genuineness of the definition.<sup>18</sup> The similarities, as well as the differences, of the two formulations invite a comparison.

Nuptiae sunt (est) coniunctio...

The coniunctio which describes marriage designates obviously the marital society, the life in common of the spouses. Of itself coniunctio ("living together") does not signify a spiritual element, a union of wills or souls. Its meaning is more naturalistic, more physical. Animals in fact could be in a coniunctio, as could slaves. When some of the medieval canonists saw in the term coniunctio of the Roman definition a joining of hearts and minds, they were possibly reading it within their own context rather than in the original.<sup>19</sup> In fact as a legal definition coniunctio is not technically precise; it was possible (though hardly

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<sup>18</sup> Thus Schulz, *ibid.*, pp. 46-47; A. Ehrhardt, "Nuptiae", *loc. cit.*, coll. 1482-1483, and "Consortium omnis vitae", in *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung*, 57(1937), pp. 357-366; A. Albertario, "De modestiniana matrimonii definitione", in *Apollinaris*, 5(1932), pp. 432 ss.; J. Gaudemet, "La définition romano-canonique du mariage", *loc. cit.*; O. Robleda, *El matrimonio en derecho romano*, pp. 59 ss. According to M. Kaser, *Das römische Privatrecht*, München, Verlag C.H. Beck, 2nd ed., 1971, Vol. 1, p. 310, the authenticity of the definition can no longer be placed in doubt.

<sup>19</sup> P. Fedele, "La definizione del matrimonio in diritto canonico", in *E.I.C.*, 1(1945), pp. 41-52.

normal) for a Roman couple to be married without living together.<sup>20</sup> Coniunctio could be seen to allude also to the "end" of marriage, procreation.<sup>21</sup> But this is only a suggestion, a vague implication. As is evident, that marriage is a coniunctio is common to both definitions. But after stating this, they diverge.

Nuptiae sunt ... consortium omnis vitae...  
(Modestinus); ...est coniunctio, individuum  
consuetudinem vitae continens (Institutes):

The terminology of the definitions is here quite different. First, that of Modestinus: marriage is a consortium omnis vitae. Consortium (con + sors = sharing a common lot), is a partnership, an association; and there is ample evidence from literary and historical sources that marriage was for the Romans a societas vitae, a consortium rerum secundarum adversarumque.<sup>22</sup> This was not the case, as was seen, so much juridically as it was socially and culturally: as an ethical and social reality marriage was always considered to be permanent.

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20 A. Albertario, "De modestiniana matrimonii definitione", loc. cit., pp. 433-434.

21 O. Robleda, El matrimonio en derecho romano, pp. 63-65.

22 See A. Albertario, loc. cit., pp. 433-434.

To what specifically does the omnis vitae of the definition refer? There are two tenable views, which are not, however, mutually exclusive. Omnis vitae may look to the duration of marriage, that is, marriage without a term, without a condition as to time. Thus it would describe the perpetuity of marriage - though not exactly in the Christian sense.<sup>23</sup> Or omnis vitae may more properly relate to the total community of life, the "ensemble of marital togetherness", to marriage as a communion of all aspects of life.<sup>24</sup> At all events, regardless of how one interprets the original precision of the phrase, the meaning of the statement that marriage was a consortium omnis vitae for the Romans is clear enough.<sup>25</sup>

The definition of the Institutes has, in place of the consortium omnis vitae of Modestinus, individua consuetudo vitae. The two phrases are clearly parallel.<sup>26</sup> Like the

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23 Ibid.

24 O. Robleda, El matrimonio en derecho romano, pp. 66-69.

25 A. Berger, op. cit., p. 409, s.v. "Consortium omnis vitae": "[The 'consortium omnis vitae'] is a basic element of the Roman marriage [...]. It is not affected by the possibility of divorce."

Ibid., p. 106, s.v. "Matrimonium": "The definition [of Modestinus] expresses, however, a basic truth about the moral and ethical elements of the Roman marriage, without saying anything about the legal aspect of the institution."

26 A. Albertario, loc. cit., p. 434; O. Robleda, El matrimonio en derecho romano, pp. 66-69.

prior expression, individua consuetudo vitae refers to a total community of life;<sup>27</sup> but it is a weaker statement. J. Gaudemet claims that while consortium evokes the old Roman familial community (extremely close-knit, united in private worship as well as by patria potestas),<sup>28</sup> consuetudo designates etymologically "common customs," whence life in common. Individua consuetudo vitae is, however, a less expressive, less happy term. The definition of the Digest is in this respect superior.<sup>29</sup>

Nuptiae sunt ... divini et humani  
iuris communicatio (Modestinus):

This element of the definition of the Digest has no equivalent in that of the Institutes. It says, literally, that husband and wife are together participants in a right which is both human and divine. Perhaps the most obvious reference is to the manus marriage of the Romans, wherein the wife joined with her husband in performing the rites of

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27 O. Robleda, ibid.

28 See note 30 below.

29 J. Gaudemet, "La définition romano-canonique du mariage", loc. cit., pp. 108-110.

the family worship.<sup>30</sup> Some authors believe that marriage with manus is in fact the original, or at least the most apt, object of the phrase.<sup>31</sup> Ehrhardt sees in addition a reference to marriage by the ancient confarreatio.<sup>32</sup> Thus,

30 Marriage with manus, by which the woman passed from her father's family into the family of her husband (She was in manu of her husband, in his power.), put the wife in the legal position of a daughter in many respects. She likewise became materfamilias and in the truest sense domina. Among her obligations was the exercise, in association with her husband, of the domestic religion, the cult of the manes. See, among others, P. Corbett, The Roman Law of Marriage, p. 122.

Regarding the Roman familial religion: "The paterfamilias was the household priest, and maintained the family worship. The Roman cultus was mainly the worship of ancestors, whose spirits, as protecting divinities, were supposed to haunt the hearth and home. It was the filial duty of descendants to supply them with food, which was sacrificed to these spirits." W. Muntz, Rome, St. Paul and the Early Church, p. 67.

Opposed to manus marriage was the free marriage, matrimonium liberum, wherein the bride remained subject to the patria potestas of her own father. She thus retained a certain independence vis-à-vis the family of her husband, at least in law.

In most ancient Rome marriage was regularly, perhaps always, with manus. It remained normal until some time toward the end of the Republic. During the Empire (which followed the Republic) manus became obsolete. Justinian's law, then, recognized only the free marriage. Inter alios, F. Schulz, Principles of Roman Law, p. 193; W. Buckland, A Text-Book of Roman Law from Augustus to Justinian, p. 106.

31 A. Albertario, loc. cit., pp. 432 ss.; J. Gaudemet, "La définition romano-canonique du mariage", loc. cit., pp. 108 ss.; A. Ehrhardt, "Consortium omnis vitae", loc. cit.

32 A. Ehrhardt, ibid. A. Berger, op. cit., p. 406, s.v. "Confarreatio", explains that confarreatio was "the earliest form of conventio in manum in order to conclude a marriage between patricians. It was a solemn ceremony in the presence of ten witnesses and a high priest. The term comes from the use of a cake of spelt (far, panis farreus) in the ceremony."

if manus marriage is that which is primarily described by the expression, the communicatio iuris humani indicates that the wife becomes a full member of the husband's family, while communicatio iuris divini identifies the spouses as participants in the family cult, sharers in worship. However, even in the case of the free marriage, without manus, this phrase of the definition points out that socially the bride and groom enter an "intimate community of life" which is proper to marriage.<sup>33</sup>

On the other hand it is possible that divini et humani iuris communicatio does not in fact refer specifically to manus marriage. In that case it is simply a further accentuation of the idea of the community of life already contained in consortium omnis vitae and again goes further than the definition of the Institutes in describing what, for the Romans, was in fact involved in marriage.<sup>34</sup>

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33 A. Albertario, "De modestiniana matrimonii definitione", loc. cit., pp. 435-436. Whereas divini et humani iuris communicatio was for Modestinus a consequence of marriage, for Justinian it was a condition for marriage: marriage between Christians and Jews was prohibited. This could explain the absence in the Institutes of the definition of Modestinus. See Albertario, ibid., pp. 432 ss.; and J. Gaudemet, "La définition romano-canonique du mariage", loc. cit., pp. 108 ss.

34 O. Robleda, El matrimonio en derecho romano, pp. 69-71.

## c) The Significance for Canon Law.

It was in some ways fortunate for the early Church to find itself situated in a society where the law of marriage was the Roman law. There was much about Roman marriage which the Church could readily accept. It was monogamous, in principle permanent, in design procreative. Roman marriage was ideally a complete community of man and wife, a corporum-coniunctio totius vitae, which implied the duty of conjugal love.<sup>35</sup> The Roman wife, unlike the woman in many other cultures, was accorded dignity and respect. The Church added, of course, to this understanding of marriage its own notion of indissolubility.<sup>36</sup>

The Roman-law definitions of marriage were themselves significant. The two celebrated formulations indicated explicitly the permanency of married life and evidenced an understanding of marriage as a unique conjugal community, an individua consuetudo vitae - or, in the more

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<sup>35</sup> Idem, "Riflessi romanistici nella definizione canonica del matrimonio", loc. cit., p. 438.

<sup>36</sup> F. Schulz (Classical Roman Law, p. 103) says admiringly: "The classical law of marriage is an imposing, perhaps the most imposing, achievement of the Roman legal genius. For the first time in the history of civilization there appeared a purely humanistic law of marriage, viz. a law founded on a purely humanistic idea of marriage as being a free and freely dissoluble union of two equal partners for life."

expressive phrase of Modestinus, a consortium omnis vitae.<sup>37</sup>

The two definitions evidently describe more than the legal aspects of marriage, but rather marriage as an ethical and social reality. Perhaps it is partly for this reason that the Roman-law definitions were destined to have a life of far greater duration than the culture from which they sprang.

## 2. The Synthesis of St. Augustine.

The first concern of the early Fathers on the subject of marriage was its moral value.<sup>38</sup> The times were characterized by a variety of religious and philosophical theories of sexuality, procreation, and marriage, many of them at odds with the nascent Christian doctrine. Some in fact deserved the title of heresy inasmuch as they flourished within, or alongside, the Church itself. Most evident perhaps were the Gnostic and Manichaeian tendencies which on the whole

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<sup>37</sup> Both definitions appear to be of the state of marriage rather than the process of entering marriage, that is, according to later designations, of matrimony in facto esse rather than in fieri. Otherwise it is difficult to explain the absence of the element of consent, so important in the Roman scheme. Thus J. Gaudemet, "La définition romano-canonique du mariage", loc. cit., pp. 107-108; O. Robleda, El matrimonio en derecho romano, pp. 59-60; J. Huber, Der Ehekonsens im römischen Recht, pp. 24-25. This position, however, is not universally held.

<sup>38</sup> See, for instance, P. Delhaye, "The Development of the Medieval Church's Teaching on Marriage", in Concilium, Vol. 5, No. 6 (1970), p. 83.

tended to disvalue procreation and thus marriage while at the same time occasionally (and ironically) leaving room for remarkable sexual excess. The threat they posed to the fundamental insights of early Christian doctrine and morality was not insignificant.<sup>39</sup>

To understand, therefore, the teaching of many of the earliest Fathers on marriage, one must appreciate the frequently polemical context in which they wrote, a polemicism directed against both rigorist and laxist positions. Since what was at stake was the question of the basic goodness of married life, the Christian approach was directed much more toward marriage as an institution for the procreation and education of offspring than marriage as a community of conjugal love and "mutual aid". Sex and generation were naturally uppermost in the minds of the orthodox apologists.

An additional preoccupation - and an important one - of the Fathers was the justification of virginity, seldom popular in ancient paganism.<sup>40</sup> For this reason it is not surprising to discover in the early Christian tracts much

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<sup>39</sup> For an account of pagan, Gnostic, Manichaeic, and other non-orthodox beliefs on sex and marriage, see J. Noonan, Contraception. A History of Its Treatment by the Catholic Theologians and Canonists, pp. 56-81, 107-126.

<sup>40</sup> See, for example, J. Gaudemet, L'Eglise dans l'empire romain, pp. 516-517.

that is defensive and even negative. Finally, since the literature of this period is primarily pastoral and practical in outlook, one finds therein little attempt to develop a theological synthesis of marriage.<sup>41</sup>

a) St. Augustine's Theology of Marriage.

As for most of the other Fathers, St. Augustine's main concern was the moral value, the honestas, of marriage. It may be no exaggeration to state that all his other theses on matrimony were corollaries of that one principle.<sup>42</sup> And while Augustine had to polemicize against the Manichaeans in favor of the good of marriage, he was forced at the same time to uphold the evil of concupiscence in opposition to the Pelagians.<sup>43</sup> Since for Augustine concupiscence was centered in - or at least closely identified with - man's sexual urge, he was faced in fact with a double task: to defend marriage and sexual activity in marriage while simultaneously maintaining the sinfulness of a casual or disordered use of sex. This accounts in great part for the

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<sup>41</sup> On the character of early ecclesiastical writing about marriage see F. Carney, The Purposes of Christian Marriage, pp. 83-89, 147-149.

<sup>42</sup> P. Adnès, Le mariage, p. 55; B. Alves Pereira, La doctrine du mariage selon saint Augustin, pp. 32-33.

<sup>43</sup> P. Alves Pereira, ibid., p. 230. See also J. Noonan, Contraception, pp. 107-126; E. Doronzo, Tractatus Dogmaticus de Matrimonio, pp. 819-820.

"dualism" which some detect in Augustine's moral theology and his teaching on marriage in general.<sup>44</sup> And because of the topical and disputatious nature of much of his writing, there is some difficulty in arriving at a neat and complete synthesis of his marriage doctrine.

The foundation of the entire Augustinian theology of marriage is his scheme of the three bona:<sup>45</sup>

These are all goods, on account of which marriage is good: offspring, fidelity, Sacrament.<sup>46</sup>

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<sup>44</sup> For instance, L. Janssens, "Chasteté conjugale selon l'encyclique Casti Connubii et suivant la constitution 'Gaudium et Spes'", in Ephemerides Theologicae Lovanienses, 42(1966), p. 528.

<sup>45</sup> B. Alves Pereira, La doctrine du mariage selon saint Augustin, p. 40: "This trilogy [of the bona] forms the three pillars which support the whole doctrine of St. Augustine on marriage. All the other goods of the conjugal society issue from these three sources. All the essential properties of marriage are encompassed within this triple formula."

Similarly U. Navarrete, "Structura iuridica matrimonii secundum Concilium Vaticanum II", in Periodica, 56(1967), pp. 554-555.

<sup>46</sup> St. Augustine, De bono coniugali, c. 24, n. 32: PL 40, 394: "Haec omnia bona sunt, propter quae nuptiae bonae sunt: proles, fides, Sacramentum."

This is threefold: fidelity, offspring, sacrament. Fidelity means that one refrains from sexual contact outside the marriage bond; offspring, that [the child] is lovingly received, tenderly nurtured, religiously brought up; the sacrament, that the marriage is not broken and the abandoned spouse marry another, not even for the sake of having children. This can be considered the rule of marriage, by which natural fecundity is adorned and the baseness of sexual disorder is restrained.<sup>47</sup>

The bona in Augustine's analysis are intrinsic to marriage: they belong to marriage by its very nature and God's design. They are part of its internal structure. Yet the bona are not identical with marriage itself, nor with its "essential properties" (C.I.C., can. 1013) of unity and indissolubility, nor with the finality of marriage, strictly speaking. They are, of course, closely connected with all these and can partially, but not perfectly, coincide with some of them.<sup>48</sup> Specifically, a bonum matrimonii can be

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<sup>47</sup> Idem, De Genesi ad litteram, lib. 9, c. 7, n. 12: PL 34, 397: "Hoc autem tripartitum est: fides, proles, sacramentum. In fide attenditur ne praeter vinculum coniugale, cum altera vel altero concubatur; in prole, ut amanter suscipiatur, benigne nutriatur, religiose educetur; in sacramento autem, ut coniugium non separetur, et dimissus aut dimissa nec causa prolis alteri coniungatur. Haec est tanquam regula nuptiarum, qua vel naturae decoratur fecunditas, vel incontinentiae regitur pravitas."

<sup>48</sup> U. Navarrete, loc. cit.; E. Doronzo, Tractatus Dogmaticus de Matrimonio, p. 931.

indistinctly and generally said to be whatever bestows upon marriage its constitution and honesty, whether it be the essence, or an essential property, or an immediate effect, or an intrinsic end.<sup>49</sup>

The bona are to some degree "the fruits or the effects of marriage and its properties".<sup>50</sup>

In the original and most fundamental meaning assigned by St. Augustine to the bona, they are "excusing causes" of marriage and its use (sexual intercourse). Sexual activity needs excuse, which it finds partly in its result, or the objective toward which it tends.<sup>51</sup> By a more or less natural extension, nevertheless, the bona transcend this somewhat negative function and describe the nature of marriage itself. Thus they become in a sense "canonical" elements, insofar as they effect and demonstrate the goodness and veritas (validitas) of marriage: marriage cannot exist without the bona.<sup>52</sup> Evidently there is a certain obscurity and lack of precision about the exact nature of the bona; this issues from St. Augustine himself.<sup>53</sup>

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49 E. Doronzo, ibid., p. 822.

50 Ibid., p. 931.

51 Ibid., p. 932; U. Navarrete, loc. cit., pp. 555-556.

52 E. Doronzo, loc. cit., p. 821.

53 U. Navarrete, loc. cit., p. 556.

As is well known, the bonum prolis refers to the procreation and upbringing of children; bonum fidei, to the spouses' exclusive right and obligation concerning the debitum coniugale; bonum sacramenti, to indissolubility.<sup>54</sup> Of these the bonum prolis indisputably holds first place. It is the "primordial element" of marriage.<sup>55</sup>

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54 St. Augustine, De peccato originali, lib. 2, c. 39: PL 44, 404: "Bonum ergo sunt nuptiae in omnibus quae sunt propria nuptiarum. Haec autem sunt tria, generandi ordinatio, fides pudicitiae, connubii sacramentum. Propter ordinatio generandi, scriptum est: Volo iuniores nubere, filios procreare, matresfamilias esse. Propter fidem pudicitiae: Uxor non habet potestatem sui corporis, sed vir; similiter et vir non habet potestatem sui corporis, sed mulier. Propter connubii sacramentum: Quod Deus coniunxit, homo non sepatet."

See also U. Navarrete, loc. cit., p. 555, and additional texts cited by him on the bonum fidei.

St. Augustine's bonum sacramenti admits of several interpretations and nuances. However "the indissolubility of the marriage bond is the principal consequence of the sacramentum". B. Alves Pereira, op. cit., p. 233.

For a fuller discussion of the meaning of bonum sacramenti see S. Heaney, The Development of the Sacramentality of Marriage from Anselm of Laon to Thomas Aquinas, pp. xii-xiv; P. Adnes, Le mariage, pp. 74-75; B. Alves Pereira, op. cit., pp. 223-228; E. Schillebeeckx, Marriage: Secular Reality and Saving Mystery, pp. 67-73.

B. Lodomérszky, Saint Augustin, docteur du mariage chrétien, pp. 116-121, finds four distinct but related meanings given by Augustine to sacramentum in connection with marriage.

55 C. Schahl, La doctrine des fins du mariage dans la théologie scolastique, p. 26.

St. Augustine, De coniugiis adulterinis, lib. 2, c. 12, n. 12: PL 40, 479: "Propagatio itaque filiorum ipsa est prima et naturalis et legitima causa nuptiarum."

The primacy of procreation in the Augustinian scheme is universally admitted by his commentators.

St. Augustine does not treat the finality of marriage as such. He does not use the word finis. There is thus some difficulty in determining his thought in this matter.<sup>56</sup> The question of the ends of marriage is immersed in the (to Augustine) wider and more fundamental order of the bona. And so the ends of marriage to some extent coincide - but not completely - with the bona. The modern formulation of the triple finality (generation, mutual help, remedy for concupiscence), elaborated by later theologians, is based on Augustinian teaching; but it is not the formulation of Augustine himself. For while his bona imply a certain finality, they do not directly indicate it. One thing is certain, however: the procreation of offspring is for Augustine not only the principal bonum; it is also the primary - if not the sole - end of marriage:

Matrimony surely takes its name from this, that a woman should marry for no other reason than to become a mother.<sup>57</sup>

Did Augustine admit any other "ends" of marriage? The question is complicated by the fact that he did not

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<sup>56</sup> On the question of the finality of marriage for St. Augustine see especially E. Doronzo, op. cit., pp. 820-826.

<sup>57</sup> St. Augustine, Contra Faustum manichaeum, lib. 19, c. 26: PL 42, 365: "Matrimonium quippe ex hoc appellatum est, quod non ob aliud debeat feminam nubere, quam ut mater fiat."

address himself directly to it. While the scheme of the three-fold bonum is central in his doctrine, Augustine actually finds more than three bona of marriage, on which he does not elaborate, however, and which can, in some way, be reduced to the three. These other bona, values, of marriage are several: fraterna societas; remedium infirmitatis (i.e., concupiscentiae); humanum solatium; bonum unitatis (by which polygamy is excluded), etc.<sup>58</sup>

[...] it is rightly asked why marriage is good. It seems to me to be so not only because of the procreation of children, but also because of the natural association itself of the sexes. Otherwise one could not say there was marriage between older persons, especially if they had lost their children or had never begotten any.

You [the catholic Church] subject women to their husbands in chaste and faithful obedience, not for the satisfaction of lust, but for the generation of children and for the association of domestic life. You set husbands over their wives, not to amuse themselves at the expense of the weaker sex, but according to the laws of sincere love.

And so the Christian can live in harmony with a wife; he can provide together with her for the needs of the flesh, this being permissible but not commanded, as the Apostle says; or he can intend to have children, and this can be praiseworthy to some degree; or he can marry for an association as of brother and sister, without any bodily commingling.

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<sup>58</sup> On the variety of values, or bona, of marriage in Augustine and their significance, see B. Alves Pereira, op. cit., pp. 43-50; C. Schahl, op. cit., pp. 25-27; A. Reuter, Sancti Aurelii Augustini doctrina de bonis matrimonii, pp. 102-118.

Thus the good of marriage is always a good; for the people of God it was at one time an obligation of the law; but now it is a remedy for weakness and for some people a solace for human nature.<sup>59</sup>

The answer to the question of whether the synthesis of St. Augustine allows for a more expansive finality for marriage than procreation alone would seem to depend upon how real a distinction one finds in his works between bona and finis.<sup>60</sup> Those who emphasize the difference between

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59 De bono coniugali, c. 3, n. 3: PL 40, 375: "[...] cur sit bonum [coniugium] merito quaeritur. Quod mihi non videtur propter solam filiorum procreationem, sed propter ipsam etiam naturalem in diverso sexu societatem. Alioquin non iam diceretur coniugium in senibus, praesertim si vel amisissent filios, vel minime genuissent."

De moribus Ecclesiae catholicae, lib. 1, c. 30, n. 63: PL 32, 1336: "Tu [Ecclesia catholica] feminas viris suis, non ad explendam libidinem, sed ad propagandam prolem, et ad rei familiaris societatem, casta et fideli obedientia subiicis. Tu viros coniugibus, non ad illudendum imbecillio rem sexum, sed sinceri amoris legibus praeficis."

De sermone Domini in monte, lib. 1, c. 15, n. 42: PL 34, 1250: "Potest igitur christianus cum coniuge concorditer vivere; sive indigentiam carnalem cum ea supplens, quod secundum veniam, non secundum imperium dicit Apostolus; sive filiorum propagationem, quod iam nonnullo gradu potest esse laudabile; sive fraternam societatem sine ulla corporum commixtione [...]."

De bono viduitatis, c. 8, n. 11: PL 40, 437: "Nuptiarum igitur bonum semper est quidem bonum; sed in populo Dei fuit aliquando legis obsequium; nunc est infirmitatis remedium, in quibusdam vero humanitatis solatium." For additional texts which illustrate the point, see E. Doronzo, op. cit., pp. 828-829.

<sup>60</sup> The question is taken up by several of the authors already cited, particularly B. Alves Pereira and A. Reuter. For a concise discussion of the subject and the different positions taken see E. Doronzo, op. cit., pp. 826-829.

the two concepts tend to see in the bonum prolis the only true and proper end of marriage. The other values are simply utilitates, similar to finis operantis. But some, noting the analogy - almost the identity - of bona and finis, find in the various goods of marriage genuine ends, finis operis, subordinate of course to procreation. They are especially those of remedium concupiscentiae and mutuum adiutorium, the bonum coniugum.

The question is to a large extent one of terminology. St. Augustine speaks often enough of a variety of values to be found in marriage. Without doubt procreation is uppermost in his mind, the most evident and natural purpose of the marital state. But there are other purposes also, other benefits to be derived from (and inherent in) marriage as established by God. These cannot compete with, or displace, the principal end. They are in this sense secondary (whether or not one considers them to be on the same level as procreation). But, despite the paucity of analysis Augustine devotes to these other purposes, he has not entirely passed them over. He recognized in particular the value of the conjugal community in itself (and just as clearly, if somewhat less enthusiastically, a "remedy of concupiscence"). In doing so he perhaps opened the door for others to develop

these ideas.<sup>61</sup>

b) The Canonical Importance of the Augustinian "Bona Matrimonii".

Subsequent authors, for whom St. Augustine was for centuries the single most influential authority on marriage, somewhat naturally took up the scheme of the three bona. The scholastic theologians and canonists, especially those of the twelfth century, generally cited literally the texts of Augustine and as a rule maintained the classic trilogy, fides, proles, sacramentum. Some, however, tended to enlarge the number<sup>62</sup> (an inclination which was not without basis in

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<sup>61</sup> C. Schahl, op. cit., p. 30.

It has been suggested (by Alves Pereira, op. cit., pp. 51-54, 231; Adnès, op. cit., pp. 56-57; Reuter, op. cit., p. 112) that Augustine, distinguishing at least implicitly between the bona of marriage and its essence, might actually see in the personal, loving community of the spouses themselves the "supreme value of marriage". The basis for this observation is primarily Augustine's treatment of the marriage of the Blessed Virgin and St. Joseph, which is, as some texts indicate, the ideal marriage for him, a union purely of hearts and wills in opposition to a union of the flesh. However this may be, the difficulty is that the use of the marriage of the Blessed Virgin as a model for all marriages almost inevitably involves a certain "spiritualization" of the conjugal society and the placing of a sharp distinction between a "union of souls" and a "carnal union". The tendency to contrast these two types of marriage can be seen particularly in some writers of the scholastic period. Canonically at least it cannot be considered very rewarding.

<sup>62</sup> See P. Abellán, El fin y la significación sacramental del matrimonio desde S. Anselmo hasta Guillermo de Auxerre, pp. 160-161.

Augustine himself). There was no precise concept of the nature itself of the bona which was common to these medieval authors. One finds the bona considered as causes of marriage, as properties, even as necessary characteristics of the spouses themselves rather than of the institution of marriage.<sup>63</sup> Most writers were content to study the effects of the bona without attempting to analyze their essence, although some, such as St. Thomas (Supplementum, q. 49, a. 2) discuss them at more length.

For most of the medieval authors, however, the notion of the bona matrimonii was employed not to decide the validity of marriage, but to justify it and excuse its "use", sexual intercourse.<sup>64</sup> They were thus very close to Augustine's own original utilization of the bona.

The Augustinian scheme appears in Gratian. In c. 10, C. 27, q. 2, for instance, noting that the marriage of the Blessed Virgin and St. Joseph possessed the triplex bonum coniugii, Gratian quotes St. Augustine (De nuptiis et concupiscentia, c. 11, n. 13) when he states:

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<sup>63</sup> Ibid., pp. 161-162.

<sup>64</sup> Ibid., p. 162. For instance, Hugh of St. Victor, De sacramentis, lib. 2, p. 11, c. 7 (PL 176, 494): "Tria sunt principaliter bona coniugii quae coniugium comitantur. Fides, spes prolis, sacramentum. [...] Haec sunt bona quae opponit coniugium contra eam quae in carne peccati adhuc manet concupiscentiam carnis, sine qua carnis comestio fieri non potest."

Therefore in the parents of Christ was found every good of marriage: fidelity, sacrament, offspring. We know that the offspring was the Lord himself; the fidelity, that there was no adultery; the sacrament, that there was no divorce.<sup>65</sup>

And later, in question 2 of Cause 32, Gratian poses the question whether a union joined not for the purpose of procreation but solely to avoid incontinence can be considered a true marriage or not. He answers, in the dictum after canon 2, that it could be argued that such a union should not be judged immoral when it includes the three bona:

Nevertheless, such a marriage is not judged to be evil. A marriage which is not entered for the purpose of having children is not evil, but is venial on account of the good of matrimony, a good which is threefold; that is, fidelity, offspring, and sacrament.<sup>66</sup>

Gratian develops this somewhat further in canon 6 of the same question, where he specifies that in the type of case mentioned (a union not for children but for avoiding incontinence) the parties intended to be faithful to each other, to remain together for life, and at least - while not wishing offspring - did nothing to prevent children from

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65 "Omne itaque nuptiarum bonum inpletum est in illis parentibus Christi, fides, sacramentum, proles. Prolem cognoscimus ipsum Dominum; fidem: quia nullum adulterium; sacramentum: quia nullum divortium."

66 "Non tamen ideo nuptiae malae iudicantur. Quod enim preter intentionem generandi fit, non est nuptiarum malum, sed est veniale propter nuptiarum bonum, quod est tripertitum: fides videlicet, proles, et sacramentum."

being born. Gratian quotes Augustine, De bono coniugali, c. 5, to the effect that it would not be unreasonable to call such a union a marriage:

It is frequently asked whether when a man and a woman, neither he nor she having been previously married to another, come together not to have children, but solely for the purpose of having sexual relations to avoid incontinence, and with fidelity to each other so that neither would have relations with a third party - whether this should be considered to be a marriage. Now perhaps it would not be completely illogical to call it marriage, if their intention is to stay together until the death of one of them, and, even though they have not united to have children, still they have not avoided offspring; that is, they have not intended to have no children, nor have they by immoral means taken steps to ensure that children would not be born.<sup>67</sup>

Gratian thus in Cause 32 refers as a possible criterion for the validity of marriage to the presence or absence of the three bona, explicitly in the prior passage, implicitly - but just as clearly - in the second. There are moral overtones present (nuptiae malae), but he evidently finds canonical as well as moral significance in the triplex

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<sup>67</sup> Gratian, Decretum, c. 6, C. 32, q. 2: "Solet queri, cum masculus et femina, nec ille maritus, nec illa uxor alterius, sibimet non filiorum procreandorum, sed pro incontinentia solius concubitus causa copulantur, ea fide media, ut nec ille cum altera, nec illa cum altero id faciat, utrum nuptiae sint vocandae? Et potest quidem fortasse non absurde hoc appellari conubium, si usque ad mortem alicuius eorum id inter eos placuerit, et prolis generationem, quamvis non ea causa coniuncti sint, non tamen vitaverint, ut vel nolint sibi nasci filios, vel etiam opere malo agant ne nascantur."

bonum matrimonii, despite the fact that he does not further develop the point.

Probably the single most important use of the bona in medieval canon law was in the Decretal Si conditiones of Pope Gregory IX (c. 7, X, de conditionibus, IV, 5). It said simply that a condition placed contrary to the "substance of marriage" rendered the marriage invalid and gave as examples of such a condition those directed against any of the three bona:

If conditions against the substance of marriage are laid down; for example, if one party should say to the other: "I contract [marriage] with you if you avoid the generation of offspring", or "until I find another more worthy in esteem or talent", or "if you give yourself to adultery for gain"; then the matrimonial contract, however desirable it may be, is deprived of all effect. And [this holds true] even though other conditions set down in marriage, if base or impossible, must be considered as not having been made on account of the favor [of the law enjoyed by marriage].<sup>68</sup>

The three bona are not mentioned by name, but the reference to them is unmistakable, as the Gloss on the

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68 "Si conditiones contra substantiam coniugii inserantur, puta, si alter dicat alteri: 'contraho tecum, si generationem prolis evites', vel: 'donec inveniam aliam honore vel facultatibus digniorem', aut: 'si pro quaestu adulterandam te tradas', matrimonialis contractus, quantumque sit favorabilis, caret effectu; licet aliae conditiones appositae in matrimonio, si turpes aut impossibiles fuerint, debeant propter eius favorem pro non adiectis haberi."

decretal notes.<sup>69</sup> It seems likely that the three examples, which are of conditions contrary to proles, sacramentum, and fides, were not meant to be exhaustive: the text itself does not allow this interpretation at least. There could be other conditions imagined against the "substance of marriage".<sup>70</sup> But the three bona of St. Augustine are naturally pointed to as obvious applications of the principle. Besides being hallowed by tradition, they easily appear, if not to exhaust, at least to exemplify the substance of marriage. It is not difficult to foresee the possibility of their becoming the

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69 The Gloss reads: "[.] et sic videtur, quod omnis conditio, quae est contra naturam contractus, ipsum impediatur, si apponatur. Et haec est ratio, cum tria debent esse bona matrimonii, saltem quoad propositum, scilicet fides, proles, et sacramentum 27. q.2. c. omne itaque. Per illas tres condiciones extinguntur illa tria bona, quae in quolibet matrimonio necessario requiruntur, aliter non erit matrimonium, ut hic patet."

Later on the Gloss explicitly remarks that the examples given in the decretal contradict the bona prolis, sacramenti, and fidei respectively.

70 See E. Jombart, "Biens du mariage", in D.D.C., Vol. 2, col. 849. Also J. Noonan, "Marital Affection in the Canonists", loc. cit., pp. 508-509: "St. Raymond, the probable draftsman of the decretal, did not identify the substance of marriage with the three goods of offspring, indissolubility, and fidelity, but he offered the examples as objective touchstones. In doing so he provided what would seem to later jurists the only juridical test of marital affection. Yet St. Raymond himself does not appear to have contemplated this reductive use of his examples. He retained in the Decretal Tua nos duxit with its broad language on the substance of marriage; and indeed this term "substance of marriage", is the operative language in Si conditiones."

usual criterion whereby future jurists would evaluate the presence or absence of the substantia coniugii, the juridical test for whether or not marriage in its essential aspects was intended by the contractants.

The scheme of the three bona continued to appear occasionally in official documents, but with little commentary. The Decretum pro Armeniis of the Council of Florence, explaining briefly each of the seven sacraments, states only that there is a triplex bonum assigned to marriage and identifies it as the Augustinian three goods.<sup>71</sup> The Catechism of the Council of Trent ("The Roman Catechism"); published in 1566, also describes marriage using the three bona, which it indicates are, first, compensations for the inconveniences of marriage and, secondly, factors which render sexual intercourse lawful.<sup>72</sup> Pope Benedict XIV in

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71 Bulla unionis Armeniorum "Exsultate Deo", 22 Nov. 1439, in Denzinger, n. 1327: "Septimum est sacramentum matrimonii, quod est signum coniunctionis Christi et Ecclesiae [...]. Assignatur autem triplex bonum matrimonii. Primum est proles suscipienda et educanda ad cultum Dei. Secundum est fides, quam unus coniugum alteri servare debet. Tertium indivisibilitas matrimonii, propter hoc quod significat indivisibilem coniunctionem Christi et Ecclesiae."

72 Catechismus ex decreto SS. Concilii Tridentini ad parochos Pii V. Pont. Max. iussu editus, pars 2, cap. 8, n. 23: "Docendi praeterea sunt fideles, tria esse matrimonii bona; prolem, fidem et sacramentum: quorum compensatione illa incommoda leniuntur, quae Apostolus indicat his verbis: 'Tribulationem carnis habebunt huiusmodi'; efficiturque, ut coniunctiones corporum, quae extra matrimonium merito damnandae essent, cum honestate coniunctae sint."

his Constitution Dei miseratione, November 3, 1741, a document of reform of procedure for adjudicating marriage cases, merely mentions in passing the bona matrimonii, an allusion to the scheme of Augustine, although he perhaps does not imply that the number is limited to three.<sup>73</sup>

By far the most complete development of the three bona in a papal document was that of Pope Pius XI's encyclical on marriage, Casti Connubii, of December 31, 1930. Fully one-fourth of the encyclical is devoted to an explanation of the meaning of Christian marriage in terms of the Augustinian tripartite scheme. Each of the bona is commented upon at length and elaborated, particularly the bonum fidei. Pius XI joins to the notion of conjugal fidelity that of the mutual love of the spouses:

This conjugal faith, however, which is most aptly called by St. Augustine the "faith of chastity," blooms more freely, more beautifully and more nobly, when it is rooted in that more excellent soil, the love of husband and wife which pervades all the duties of married life and holds pride of place in Christian marriage. [...] The love, then of which We are speaking is not that based on the passing lust of the moment nor does it consist in pleasing words only, but in the deep attachment of the heart which is expressed in action, since love is proved by

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<sup>73</sup> P. Gasparri - J. Serédi, Codicis iuris canonici fontes, Vol. 1, p. 695: "Siquidem Matrimonii foedus a Deo institutum, quod, et quatenus naturae officium est, pro educandae proles studio, aliisque Matrimonii bonis servandis, perpetuum, et indissolubile esse convenit [...]."

deeds. This outward expression of love in the home demands not only mutual help but must go further; must have as its primary purpose that man and wife help each other day by day in forming and perfecting themselves in the interior life, so that through their partnership in life they may advance ever more and more in virtue, and above all that they may grow in true love towards God and their neighbor, on which indeed "dependeth the whole Law and the Prophets".<sup>74</sup>

The encyclical continues, in a passage curiously omitted in the early English translations, the theme of "mutual interior perfection":

This mutual interior formation of the spouses, this serious effort to perfect each other, can in all truth be said to be, as the Roman Catechism teaches, the primary cause and reason for marriage, if marriage is considered not in the stricter sense as an institution for the procreation and education of offspring, but in a wider meaning of a communion of every aspect of life, a community, a society.<sup>75</sup>

The encyclical concludes its treatment of the bonum fidei of marriage with the following passage:

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<sup>74</sup> A.A.S., 22(1930), pp. 547-548. The translation, unless otherwise noted, is that of the National Catholic Welfare Conference, 1931.

<sup>75</sup> Ibid., pp. 548-549. The translation here is the author's. Not until 1936 was this passage included in the English translations. No explanation of the oversight seems to have been published. See M. Carlen, Dictionary of Papal Pronouncements: Leo XIII to Pius XII (1878-1957), New York, P.J. Kenedy and Sons, 1958, p. 27.

Interestingly, perhaps, the final expressions are quite Roman: "totius vitae communio, consuetudo, societas".

These, then, are the elements which compose the blessing of conjugal faith: unity, chastity, charity, honourable noble obedience, which are at the same time an enumeration of the benefits by which the peace, the dignity and the happiness of matrimony are securely preserved and fostered. Wherefore it is not surprising that this conjugal faith has always been counted amongst the most priceless and special blessings of matrimony.<sup>76</sup>

The exposition of the three bona matrimonii in Casti Connubii has had little, if any, direct canonical repercussion. Obviously the encyclical's import and intent were more pastoral, moral, and doctrinal (for instance, on the question of artificial contraception) than legal. It is an interesting example, however, of the use and development of Augustine's schematic framework to include more than he himself envisaged (or at least stated) by it. And possibly more importantly, Casti Connubii was here an indication that marriage is, in Catholic doctrine, somewhat more than the sum of the three classic bona of St. Augustine as they are strictly (and "canonically") understood.

Long before Casti Connubii there had been an evolution (beginning perhaps in the sixteenth century) which was of more significance for canon law, an evolution whereby the bona began increasingly to be used in the determination

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<sup>76</sup> A.A.S., loc. cit., p. 550.

of the validity of marriage.<sup>77</sup> As was seen earlier, this use was contemplated at least as early as the thirteenth century, with the publication of the Decretals of Gregory IX and the canon Si conditiones. The influential canonist Thomas Sanchez, writing at the beginning of the seventeenth century, bears witness to this usage. The three bona, he says, belong to the essence of marriage, at least quoad obligationem. The spouses are strictly - and in law - obliged to observe them. Thus:

A condition contrary to the substance of marriage, or its bona, renders it invalid [and Sanchez refers to the Decretal Si conditiones among other passages]. The reason is that without its substance nothing can exist [...]; but the substance of marriage consists in consent to the conjugal society, in which is tacitly included consent to a perpetual society, to fidelity mutually observed, and to the reception of offspring, which are the tria bona matrimonii.<sup>78</sup>

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<sup>77</sup> U. Navarrete, "Structura iuridica matrimonii secundum Concilium Vaticanum II", in Periodica, 56(1967), pp. 559-560.

<sup>78</sup> Sanchez, De sancto matrimonii sacramento, lib. 5, disp. 9, nos. 2-3: "Praetermittendum est, quamvis tria bona matrimonii non sint de eius essentia, quoad executionem; esse tamen de essentia quoad obligationem; est enim de essentia, ut coniuges obligentur ad vitam perpetuam et individuum, et ad fidem sibi servandam; reddendo debitum, negandoque corpus alii; prolemque non impediendam, sed educandam, si Deus eam dederit [...]. Unde conditiones, et pacta, per quae coniuges ad aliquid his contrarium obligantur, tollunt matrimonii substantiam, et debitum consensum.

"Hic supposito, sit conclusio: Conditio contraria substantiae matrimonii, aut bonis eius, illud irritum reddit [...]. Et ratio est, quia sine substantia nihil potest subsistere [...]. Sed substantia matr. consistit in consensu ad societatem conjugalem, sub quo tacite includitur ad perpetuam societatem, ad fidem mutuo sibi servandam prolemque suscipiendam, quae sunt tria bona matrimonii."

This passage of Sanchez can serve as an adequate statement of the position of the scheme of the three bona in juridical practice today. Jurisprudence has relied heavily upon the Augustinian formulation, possibly because it so easily lends itself to the role of a workable criterion for matrimonial validity and is capable of gathering up so much of what is of the essence and purpose of marriage.<sup>79</sup> The three bona are easily identified in current ecclesiastical jurisprudence by their frequent appearance among the capita nullitatis of marriage.

The Codex Iuris Canonici does not explicitly utilize the scheme of the bona. Still, they are present indirectly. The ends and essential properties of marriage (can. 1013) correspond in part to the goods of St. Augustine. Consent must be directed to actions suitable for procreation, the right to such actions being exclusive and perpetual (can. 1081). The law regarding conditional consent (can. 1092) presupposes the three bona (and among its sources is Pope Gregory IX's Si conditiones).

The tria bona matrimonii of St. Augustine are an important part of the heritage of canonical science. As valuable as they are in the history of canon law today, they

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<sup>79</sup> See E. Doronzo, Tractatus Dogmaticus de Matrimonio, pp. 932-933.

do not, of themselves, encourage a consideration of marriage as a consortium omnis vitae. They impede, in fact, such an understanding by reason of their restrictive character. Their very nature, simplifying and schematic as it is (and thus useful, of course), necessarily limits the scope of the institution they describe (and whether the limitation is significant remains to be seen). It is for this reason - and because of an awareness by some theologians and canonists of the several values of marriage - that in the course of history a number of attempts have been made to transcend their boundaries. Two such attempts have already been noted: the tendency of a few medieval authors to expand the number of the bona,<sup>80</sup> and the encyclical Casti Connubii in which Pope Pius XI enriched their content. But there were other possible approaches besides the bona for understanding the reality of marriage. This is the subject of the following chapters.

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<sup>80</sup> One example of several is the author of the Summa Sententiarum (thought at one time to be Hugh of St. Victor, but now acknowledged to be another member of the Victorine school): "Nunc quae sunt bona coniugii inquiramus. Sunt igitur tria bona coniugii: fides, proles, sacramentum. [...] Praeterea sunt alia coniugii bona velut vitatio fornicationis et amicitia viri et mulieris ex societate procedens coniugali; at aliquando pax inter homines sibi prius hostiliter adversantes" (Summa Sententiarum, VII, cap. 4: PL 176, 157).

## CHAPTER II

### THE CLASSICAL FORMULATION OF THE NATURE OF CHRISTIAN MARRIAGE: DEFINITIONS AND FINALITY

As they were for theology, the twelfth and thirteenth centuries were for canon law as well a kind of Golden Age. Gratian published his Decretum near the middle of the twelfth century (perhaps ca. 1141). In 1234 there appeared the Decretals of Pope Gregory IX, and by the end of that century the Liber Sextus of Pope Boniface VIII had been published. Thus the classic marriage law of the Church was to a large extent formulated by the year 1300, although the Corpus Iuris Canonici would not be completed until later. The same twelfth and thirteenth centuries were also the era of the most fruitful theological speculation on the nature of marriage, from Hugh of St. Victor (+ 1142) and the Sentences of Peter Lombard (written ca. 1155-1158) to St. Thomas Aquinas, St. Bonaventure, and Duns Scotus (+ 1308).

There is no single scientific conceptualization of marriage which perfectly describes its nature or exhausts its meaning. This is probably true even within the limits of the juridico-theological dimension of the institution. Among the canonical and theological approaches to marriage, three have been singled out to be dealt with in this chapter and the next as avenues by which to explore whether and to

what extent there is historical justification for considering marriage to be a consortium omnis vitae. The first of these approaches is the definition itself of marriage. The second is the question of the finality, or the various ends, of marriage. And the third approach (chapter three) is the identification of the object of matrimonial consent.

Naturally these avenues of investigation are not the only ones possible, nor are they necessarily of equal importance. But each from its own vantage point looks to what is at the very heart, juridically speaking, of marriage, its canonical nature. The temporal focus of these two chapters is the twelfth and thirteenth centuries, although it is not strictly limited to that period.

The authors studied here are theologians as well as canonists. The reason for this is that, as G. Le Bras notes, there was no clear line of demarcation, in the age of the formation of the classical doctrine of marriage, between the realm of the theologians and that of the jurists. The theologians, commenting chiefly upon the Sentences of Lombard, treated legal as well as theological questions. The canonists, commenting primarily upon Gratian and the Decretals, dealt with theology as well as canon law. The principal reason

for this was perhaps the nature of the subject itself.<sup>1</sup> Marriage was seen to be both a sacrament and a contract. Moral, sacramental, and legal questions were intertwined. The two great "Schools", of Bologna and Paris, influenced the work of canonists and theologians alike. In addition, many canonical questions depended for their solution upon theology. The famous decision of Pope Alexander III on the formation of the marriage bond (so-called "mitigated consensualism"), which was a canonical solution par excellence, followed basically the position of Lombard, the theologian.

There is one thread in particular which runs through the entire Scholastic investigation of the nature of marriage. It is the question of the copula and the consensus, the problem of whether marriage is most fundamentally characterized by the act of sexual intercourse or by simple voluntary consent to marry. To some extent, the copula-consensus polarity extends beyond the classical age: it is observable even in the Code of Canon Law. It is especially in evidence, though, in the era under consideration in these two chapters. Affecting as it does each of the three approaches taken here to the study of marriage, it serves as a constantly

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<sup>1</sup> G. Le Bras, "La doctrine du mariage chez les théologiens et les canonistes depuis l'an mille", in D.T.C., Vol. 9, coll. 2162-2163. See also H. Martinez, De scientia debita in matrimonio ineundo, pp. 88-90.

re-occurring leitmotiv.

1. The Definition of Marriage.

a) Recovery of the Roman Definitions.

For some centuries after Justinian the definitions of Modestinus and the Institutes seem to have been lost to ecclesiastical authors. They are not found, for instance, in Isidore of Seville (+ ca. 636). He defines marriage thus:

Matrimonium est nubilium iusta conventio  
et conditio.

Coniugium est legitimarum personarum inter  
se coeundi et copulandi nuptiae.<sup>2</sup>

But the Roman definitions reappear in the canonical collections of the end of the eleventh century, for instance in the Brittanica, a collection of decretals the latest of which is from 1089 and which contains fragments borrowed from

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<sup>2</sup> Isidore, Etymologiae, IX, VII, De coniugiis, 19-20, in PL 82, 366. The reading "nubilium" for "nobilium" is from a critical edition of Isidore, W.M. Lindsay, ed., Isidori Hispaliensis Episcopi Etymologiarum sive originum libri XX, Oxonii, E typographeo Clarendoniano, 1911, Vol. 1 (unpaginated).

An English translation might read thus: "Matrimonium is the legally-sanctioned agreement and status existing between persons capable of marriage. Coniugium is the marriage of lawfully-capable persons for coming together in [bodily] union."

the Digest and the Institutes.<sup>3</sup> It may be Ivo of Chartres (+ ca. 1115) who was chiefly responsible for introducing the definition of the Institutes to the Scholastics.<sup>4</sup> Having some acquaintance with Roman law, he reproduced the definition of the Institutes both in his Decretum (VII, 1: PL 161, 583) and his Panormia (PL 161, 1243-1244): "Nuptiae sive matrimonium est viri mulierisque coniunctio, individuum consuetudinem vitae continens."

The same definition, only slightly modified, appears also in Gratian, first in the introductory dictum to question 2, Cause 27, which begins the treatise on marriage:

Sunt enim nuptiae sive matrimonium viri mulierisque coniunctio, individuum vitae consuetudinem retinens.

It is found again in the long dictum which itself forms the first question of Cause 29:

Coniugium sive matrimonium est viri et mulieris coniunctio, individuum vitae consuetudinem retinens.<sup>5</sup>

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<sup>3</sup> J. Gaudemet, "La définition romano-canonique du mariage", in Speculum iuris et Ecclesiarum. Festschrift für Willibald Plöchl zum 60. Geburtstag, p. 110. It was about this time that the Digest was rediscovered and the great revival of Roman law began in the West. See B. Nicholas, An Introduction to Roman Law, p. 46.

<sup>4</sup> J. Gaudemet, loc. cit.

<sup>5</sup> Notice that in both instances in Gratian (not however in Ivo) the last word of the definition of the Institutes, "continens", becomes "retinens". It is indicative of the casualness of attention paid at the time to exact quoting. Henceforth "retinens" will prevail among the authors. See J. Gaudemet, ibid., p. 111.

And the definition of the Institutes appears likewise among the Decretals of Gregory IX, being used by Pope Alexander III (1159-1181) in a decretal addressed to the Archbishop of Genoa:

... quum matrimonium sit maris et feminae coniunctio, individuum vitae consuetudinem retinens (c. 11, X, II, 23).

The theologians also took up the Roman definitions. Hugh of St. Victor (+ 1142), the first theologian since St. Augustine to write a complete treatise on marriage, used a modified version of the definition of the Institutes in his De sacramento coniugii, c. 4:

Some have thought marriage should be defined in this way: "coniugium esse consensum masculi et feminae individualem vitae consuetudinem retinentem".<sup>6</sup>

Peter Lombard, whose Sentences would become the basic theological text of the Middle Ages, and whose main sources for marriage were Hugh of St. Victor and Gratian,<sup>7</sup> used as his definition one derived from the Institutes:

Sunt igitur nuptiae vel matrimonium viri mulierisque coniunctio maritalis inter legitimas personas, individuum vitae consuetudinem retinens.<sup>8</sup>

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6 PL 176, 483.

7 See, inter alios, G. Le Bras, loc. cit., col. 2151.

8 Peter Lombard, Libri IV Sententiarum, lib. IV, dist. 27, c. 2.

Thus it can be seen how this Roman definition of marriage would come to be the common one from the time of the Scholastics until the Code of Canon Law. Its use by Gratian on the one hand and by Lombard on the other would assure it a longevity and popularity which made it truly the "classical" definition of matrimony in theology and canon law. It was accepted by most of the commentators of Lombard and of Gratian and the Decretals, that is to say, by practically all the ecclesiastical authors of the classic era.

Nothing has yet been said of the definition of Modestinus in the medieval writers. It was, as was seen, the definition of the Institutes which was the more commonly accepted.<sup>9</sup> The reason possibly lies in the fact that the Institutes were known to the Middle Ages before the Digest, and the medievals had a marked tendency to traditionalism.<sup>10</sup>

But the definition of Modestinus was not totally overlooked. It appears for perhaps the first time in the Summa of Paucapalea (fl. 1144-1150), one of the first disciples of Gratian:

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9 Some of the early Scholastics attributed the definition of the Institutes to St. Isidore, a curious fact in that it is not found in Isidore. See P. Abellán, El fin y la significación sacramental del matrimonio desde S. Anselmo hasta Guillermo de Auxerre, p. 154.

10 J. Gaudemet, loc. cit., pp. 112-113.

Matrimonium est consortium omnis vitae,  
divini et humani iuris communicatio.<sup>11</sup>

Paucapalea accompanies this definition with that of the Institutes, and he explains the phrase divini et humani iuris communicatio to mean that the spouses share "one church, one 'chorus', one home, and the like".

Likewise the canonist Stephen of Tournai (ca. 1128-1203) in his Summa of Gratian's Decree uses the definition of the Digest, without comment except to note that there is no contradiction between the two definitions.<sup>12</sup> And the decretalist Tancredus (ca. 1185-ca. 1234) also reproduces the definition of Modestinus.<sup>13</sup> The theologians also were not unaware of this definition,<sup>14</sup> but for the most part they used that of the Institutes. St. Albert the Great (ca. 1200-1280) says that the definition of Modestinus is that of the jurists. He prefers the definition of the Institutes, but

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<sup>11</sup> Paucapalea, Summa, Causa 27 (von Schulte, p. 111).

<sup>12</sup> Stephen of Tournai, Summa, Causa 27 (von Schulte, p. 232). J. Gaudemet, loc. cit., says that Stephen is the first to mention the definition of Modestinus; but he has perhaps overlooked Paucapalea.

<sup>13</sup> See P. Abellán, op. cit., p. 14.

<sup>14</sup> For instance, Hugh of St. Cher (+ 1264). See P. Abellán, "La doctrina matrimonial de Hugo de San Caro", in Archivo teológico granadino, 1(1938), p. 34, who also says that it was the canonists who used the definition of Modestinus, while the theologians customarily employed that of the Institutes.

defends the acceptability of the other while explaining (somewhat condescendingly?) that "Decretists do not usually concern themselves with definitions or with other matters pertaining to subtlety of thought".<sup>15</sup>

b) Interpretation of the Roman Definitions.

Somewhat surprisingly (or perhaps not so much, given the tendency of the time to rely upon traditional formulations) one finds among the early Scholastics few significant attempts to analyze the Roman definitions, particularly with regard to the content of the expressions consortium omnis vitae and individua consuetudo vitae. Often enough the definitions are simply produced without comment. When they are remarked upon, a typical explanation is that marriage prohibits a spouse from professing continence or from retiring to prayer (i.e., temporarily refraining from demanding or agreeing to sexual intercourse) without the consent of the other;<sup>16</sup> or that a married person may not separate to find a new spouse while one's partner is still living.<sup>17</sup> The sexual interpretation is frequent, as for

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<sup>15</sup> St. Albert the Great, In IV Sententiarum, dist. 27, art. 2 (Borgnet, Vol. 30, pp. 129, 131).

<sup>16</sup> For instance, Gratian, c. 3, C. 27, q. 2; Lombard, lib. IV, dist. 27, c. 2.

<sup>17</sup> Lombard, ibid.

instance in the theologian Gandulph of Bologna (+ ca. 1185), who states that the phrase individua vitae consuetudo means that the spouses

are each obliged to render to the other the debitum, so that neither of them has the right to live an independent life (dividua vita) without the other's consent, that is, to live in continence.<sup>18</sup>

The decretal of Alexander III to the Archbishop of Genoa (c. 11, X, II, 23),<sup>19</sup> which employs the definition of the Institutes, uses the definition itself as part of a juridical argument. The question posed to the pope was the thorny one (but surely common enough in that period of frequent clandestine marriages) of how one should determine in a particular case whether marriage and not concubinage had been intended when the parties gave conflicting testimony. Alexander's solution was that in the case at hand an inquiry should be made among the acquaintances of the couple to determine whether or not the man truly considered the woman to be his wife, whether "he held her in bed and board as a wife or as a concubine, quum matrimonium sit maris et feminae coniunctio, individuum vitae consuetudinem retinens". The use of the definition in the

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<sup>18</sup> Gandulph of Bologna, Sententiarum libri quatuor, lib. IV, #225 (de Walter, p. 514).

<sup>19</sup> This is referred to above, p. 46.

argument is interesting. While the definition is not analyzed or even interpreted, it is understood to describe the relationship which exists between husband and wife, but not the relationship between persons who merely cohabit. Marriage and concubinage can in some instances appear quite similar and almost indistinguishable (the case presented to Pope Alexander). Both may involve a sharing of bed and board; but to share bed and board with the woman whom one considers one's wife is not the same as sharing with a concubine. The difference can be expressed by recalling that the prior arrangement is a "coniunctio individuum vitae consuetudinem retinens", while the other is not. One might say that underlying the Roman definition as used here is an understanding of marriage as including a certain set of mind, an intention directed toward a uniquely "marital" relationship.<sup>20</sup>

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20 The relevant part of the decretal is the following: "Verum, quia in huiusmodi dubietate fama vicinia magis debet attendi, tuae sollicitudinis erit famam loci inquirere, utrum praedictus vir eam in lecto et in mensa sicut suam uxorem aut concubinam habuerit; et si fama loci habet, quod vir ipsam in lecto et in mensa sicut uxorem tenuerit, quum matrimonium sit maris et feminae coniunctio, individuum vitae consuetudinem retinens; cogenda est mulier, ut eidem viro affectu seruiat coniugali [...]."

It is interesting that St. Raymond of Peñafort quotes this decretal to illustrate the meaning of the definition of the Institutes. Afterwards he gives the definition of Modestinus, without comment. Summa, lib. IV, tit. 2, De matrimonio, n. 1.

One of the more complete analyses by a canonist of the definition of the Institutes is that of Rufinus in his Summa (ca. 1165) on the Decree of Gratian. "Coniunctio", explains Rufinus, is not to be understood as the mingling of the flesh, but as the mutual assent of wills (animorum), such as takes place at espousal. "Individuam vitae consuetudinem retinens" refers to the obligation of the spouses to live as man and wife permanently, to "show oneself in all things to the other as one is to oneself" (talem se in omnibus exhibere viro, qualis ipse sibi est, et e converso: an expression taken from Gratian, c. 3, C. 27, q. 2), and to refrain from professing continency or withdrawing for prayer except by mutual consent.<sup>21</sup>

This explanation by Rufinus exemplifies the usual interpretation by the Scholastics - when they did interpret - of what had become the common definition of marriage. There was practically no attempt (most likely because of simple lack of knowledge) to examine the Roman sources. They saw in the coniunctio an unio corporum et animorum, that is, the copula and the consensus, the double union of married

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<sup>21</sup> Magister Rufinus, Summa Decretorum, Causa 27 (Singer, pp. 430-431).

persons.<sup>22</sup> The individua consuetudo vitae (and occasionally the consortium omnis vitae) was frequently interpreted to be a reference to the permanency of marriage. There were suggestions (Pope Alexander III, St. Raymond, St. Thomas) that these expressions might indicate an emotional (or "interpersonal") dimension of married life, but the point was not pursued.<sup>23</sup> One looking for a significant development of the notion of marriage as a consortium omnis vitae will not find it in the use by the medievals of the celebrated Roman definitions.

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22 See J. Hervada, "La estructura jurídica del matrimonio", in "Cuestiones varias sobre el matrimonio", I.C., 13, No. 25(1973), pp. 37-40; and P. Viladrich, "Amor conyugal y esencia del matrimonio", in I.C., 12, No. 23 (1972), pp. 272-273.

23 St. Thomas's explanation of the Roman definitions, both of the Institutes and of Modestinus, was perhaps as profound as that of any other medieval author. He devotes a short article (Suppl., q. 44, art. 3) to explaining the appropriateness of the definitions, particularly that of the Institutes. Having previously explained (art. 1) that marriage is a type of union, distinct from other unions in that it is ordered to procreation and to a single domestic life (ad unam vitam domesticam), St. Thomas points to the term coniunctio as describing the essence of marriage.

For the consortium omnis vitae of Modestinus, St. Thomas uses the version consortium communis vitae. This, says Thomas, designates the effect of marriage: vita communis refers to domestic affairs (in rebus domesticis). The phrase communicatio divini et humani iuris indicates that marriage is regulated by laws which are both human and divine, in contrast to other associations, such as business and the military, which have been instituted only by human legislation.

## c) Other Definitions.

Despite the popularity of the Roman definitions, there were some other definitions of marriage used in the era under consideration. Hugh of St. Victor (a unique figure in the history of the development of marriage doctrine, as will be seen later), in addition to citing the definition of the Institutes, puts forward his own:

What is marriage but a lawful society between a man and a woman, a society in which each person by mutual consent owes himself to the other? This owing can be looked at in two ways, namely that one keeps himself for the other and does not deny himself to the other. He keeps himself in that he does not pass over to another society after giving that consent. He does not deny himself in that he does not separate from that mutual common society.<sup>24</sup>

Hugh thus defines marriage as a societas of mutual self-giving. This is in harmony with his theology of marriage and implies at least a sharing of personal lives and destinies. But far more frequent is the practice of defining marriage primarily (sometimes even exclusively) in terms of sexual intercourse, of emphasizing the procreative aspect of marriage. Medieval examples of this tendency abound. Anselm

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<sup>24</sup> Hugh of St. Victor, De B. Mariae virginitate, c. 1; PL 176, 859: "Quid est enim coniugium nisi legitima societas inter virum et feminam; in qua videlicet societate ex pari consensu uterque semetipsum debet alteri? Debitum autem hoc duobus modis consideratur, ut scilicet et se illi conservet, et se illi non neget. Conservet videlicet ne post talem consensum ad alienam societatem transeat. Non neget ut ab ea quae ad invicem est communi societate se non disiungat."

of Laon (+ 1117) in his Sentences gives this definition of marriage:

Marriage is the consent of man and woman, maintaining an undivided way of life (individualem vitae consuetudinem retinens), that is, living together and having sexual intercourse without impeding procreation; it is legitimate, that is, lawfully entered by persons lawfully qualified.<sup>25</sup>

The disciples of Peter Abelard (1079-1142), probably because of their master's preoccupation with the morality of the conjugal act, frequently defined marriage in terms of it:

Marriage is a legitimate union of man and woman, by which it is lawful for them to have sexual intercourse without sin.<sup>26</sup>

In the Epitome theologiae christianae marriage is described as "a legitimate union of man and woman because of which

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25 "Coniugium est consensus masculi et feminae, individualem vitae consuetudinem retinens, id est individualiter commanendi et carnaliter commiscendi absque prolis vitatione, legitimus, id est inter legitimas personas legitime factus." Cited by G. Le Bras "La doctrine du mariage chez les théologiens et les canonistes depuis l'an mille", in D.T.C., Vol. 9, col. 2142.

The definition of the treatise Coniugium est secundum Isidorum is similar: "Coniugium est masculi consensus et femine individualement vite consuetudinem retinens individualiter commanendi et carnaliter commiscendi, absque prolis vitatione legitimus." Cited by P. Abellán, El fin y la significación..., p. 155.

26 Sententiae Parisienses: "Coniugium est maris et feminae federatio, per quam licet eis sine peccato commisceri." Cited by S. Heaney, The Development of the Sacramentality of Marriage from Anselm of Laon to Thomas Aquinas, p. 81.

they are permitted to have intercourse without fault."<sup>27</sup>

Similarly the author of the Ysagoge in theologiam says that "marriage is a legitimate association of man and woman conferring the license to have intercourse without fault".<sup>28</sup>

Even St. Albert the Great, though he follows Peter Lombard's position that marriage is formed by consent, not by copula, includes a reference to the latter in the definition of marriage which he approves:

... mutual consent [to marry] is directed to carnal copula and to cohabitation, not just of any kind, but that which is marital.<sup>29</sup>

Most interesting of all for their similarity to the formulations in the Code of Canon Law are the three definitions devised by Duns Scotus (ca. 1265-1308). His definitions are, respectively, of marriage as such, as a contract, and as a sacrament:

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27 PL 178, 1745: "Coniugium est maris et feminae foederatio legitima, propter quam licet eis sine culpa commisceri."

28 "Coniugium est maris et feminae legitima confederatio conferens licenciam commiscendi absque culpa." Cited by S. Heaney, op. cit., pp. 81-82, who can also be consulted for other examples of similar definitions of marriage by authors of the School of Abelard.

29 In IV Sententiarum, dist. 28, art. 6 (Borgnet, Vol. 30, p. 195): "Tamen quidam dicunt, quod consensus in communi fit ad carnalem copulam et ad cohabitationem, non quamcumque sed maritalem: et bene puto, quod illi expressius dicunt."

Marriage is an indissoluble bond between man and wife arising from the mutual transferral of power over each other's body for the procreation and right education of offspring.

The contract of marriage is the mutual transferral by man and wife of their bodies for perpetual use in the procreation and right education of offspring.

The sacrament of marriage is the expression of certain words of man and wife, signifying the mutual handing over of power over each other's body for the right procreation of offspring, efficaciously signifying by divine institution the conferral of a grace which is beneficial to each of the contractants for their mutual joining of souls.<sup>30</sup>

To conclude this aspect of the investigation of the classical doctrine on marriage, the study of its definition, it can be seen that there is little room in the various formulations of the Scholastics for acknowledging in marriage a consortium omnis vitae as a special quality attaching to, or describing, the personal aspects of the marital

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<sup>30</sup> Duns Scotus, Quaestiones in quartum librum Sententiarum, dist. 26, q. unica (Omnia opera, Vol. 19, p. 186): "Matrimonium est vinculum indissolubile inter marem et foeminam, ex mutua translatione potestatis corporum suorum in se invicem facta ad procreandam prolem debite educandam."

"Contractus matrimonii est maris et foeminae mutua translatio corporum suorum, pro usu perpetuo ad procreandam prolem debite educandam."

"Sacramentum matrimonii est expressio certorum verborum maris et foeminae, ad se invicem significantium traditionem mutuae potestatis corporum ad prolem debite procreandam, ex institutione divina efficaciter significans gratiam conferendam, mutuo contrahentibus ad coniunctionem mutuam animarum gratiosam."

society. Although the idea underlies the Roman definitions, and was on occasion implicitly recognized in classical law and theology, it was not accentuated, or even seriously commented upon, by the medieval authors in their employment of the Roman definitions (usually that of the Institutes). And with practically the sole exception of Hugh of St. Victor, those authors who devised or accepted other definitions than the (customary) Roman ones did not describe a consortium vitae either. On the contrary, in fact, it was the idea of sexual intercourse and procreation which was generally stressed. The definitions of Duns Scotus are possibly the most striking example of this tendency.

## 2. The Finality of Marriage.

Neither the early Fathers nor St. Augustine himself gave lengthy attention to the independent question of the finality, or purpose, of marriage. The Fathers tended to see marriage in terms of procreation and of the lessening of concupiscence and on the whole did not appear to acknowledge a middle ground, or integrating position, between the two, such as the idea that the conjugal act could itself contribute to the partners' mutual love or strengthen their union.<sup>31</sup>

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<sup>31</sup> P. Adnès, Le mariage, p. 59.

Nor did St. Augustine treat specifically of the finality of marriage. For him as well as his theological predecessors the prime purpose of marriage was to raise up children. While the place of procreation was beyond question, St. Augustine did recognize, as was seen in chapter one, other values in marriage besides offspring. For instance, in what would become one of his most widely-quoted passages, he wrote:

It is rightly asked why marriage is good. It seems to me to be so not only because of the procreation of children, but also because of the natural association itself of the sexes. Otherwise one could not say that there was marriage between older persons, especially if they had lost their children, or had never begotten any.<sup>32</sup>

But St. Augustine's synthesis of marriage was built around his three-fold bonum; and while the bona allowed for a theory of finality, they did not make one explicit.

It was St. Isidore of Seville (+ ca. 636) who was probably the first to formulate clearly the doctrine of the three ends of marriage which would become classic:

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<sup>32</sup> St. Augustine, De bono coniugali, c. 3, n. 3: PL 40, 375. See above, p. 26, note 59.

There are three reasons (causae) to take a wife. The first is for offspring, as it is read in Genesis: "And he blessed them, saying: Increase and multiply" (Gen. i, 28); the second reason is assistance, as it is likewise said in Genesis: "It is not good for man to be alone; let us make him a helpmate similar to himself" (Id., ii, 18); the third reason is incontinence; whence the Apostle says that he who does not remain continent should marry.<sup>33</sup>

Already it was clear that procreation had first place in the listing of purposes, or ends, of marriage. The Fathers had accepted it almost unanimously; St. Augustine had emphasized it clearly; and Isidore with his triple finality affirmed it. What remains is to trace briefly the primacy of the procreative end of marriage through later centuries and then to look also at the other purposes.

a) Procreation as the Principal End of Marriage.

The schematization of the ends of marriage, like other aspects of the sacrament, began to be seriously elaborated in the twelfth century. This involved a number of points, such as reaching a commonly-accepted terminology, distinguishing institutional ends from subjective motives

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<sup>33</sup> Isidore, Etymologiae, lib. 7, cap. 7, De coniugiis, 27: PL 82, 367: "Tres autem ob causas ducitur uxor: prima est causa prolis, de qua legitur in Genesi: 'Et benedixit eis, dicens: Crescite, et multiplicamini' (Gen. i, 28); secunda causa adiutorii, de qua ibi in Genesi dicitur: 'Non est bonum esse hominem solum, faciamus ei adiutorium simile' (Id. ii, 18); tertia causa incontinentiae; unde dicit Apostolus ut qui se non continet, nubat."

(fines operis from fines operantis), and determining a hierarchy among the purposes of marriage.<sup>34</sup> The process would not reach some stage of completion until perhaps the sixteenth century, but in the meantime a major premise had been agreed upon from the beginning: the generation and upbringing of children was the primary purpose of marriage as intended by God. With possibly the sole exception of Hugh of St. Victor, canonists and theologians accepted as the first end of marriage the generation of offspring.

It was common teaching that marriage had been instituted ad officium (for procreation) and ad remedium (i.e., ad remedium concupiscentiae). This implied that there was a double finality which corresponded to the double institution. The earliest Scholastics seldom studied ex professo the hierarchy existing between these two purposes; and so there was a sense in which the two ends were situated on the same level: marriage had a "double principal end". Still, of the two, procreation was by far the more important:

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34 U. Navarrete, "Structura iuridica matrimonii secundum Concilium Vaticanum II", in Periodica, 56(1967), pp. 364-366. See also A. Lanza, "De fine primario matrimonii", in Apollinaris, 13(1940), pp. 223-224; F. Carney, The Purposes of Christian Marriage, p. 187.

it was a fundamental datum of nature.<sup>35</sup> Of special interest to the canonists was the question of when and to what extent does the avoidance of procreation invalidate marriage. An early highpoint in answering this was reached by the decretist Huguccio (whose Summa was written some time after 1185). There is not required for a valid marriage, said Huguccio, the positive intention to have children; but a positive will to impede generation is an obstacle to validity.<sup>36</sup>

Perhaps the most significant development in the early study of the ends of marriage was the process of distinguishing the purposes of matrimony from the bona matrimonii of

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35 See R. Weigand, "Die Lehre der Kanonisten des 12. und 13. Jahrhunderts von den Ehe Zwecken", in Studia Gratiana 12. Collectanea Stephan Kuttner II, 1967, pp. 443-478; C. Schahl, La doctrine des fins du mariage dans la théologie scolastique, p. 72; P. Abellán, El fin y la significación sacramental del matrimonio desde S. Anselmo hasta Guillermo de Auxerre, p. 26; P. Adnès, Le mariage, p. 83.

36 See P. Abellán, op. cit., p. 158. The text of Huguccio is the following: "[...] quod si aliqui sic contrahunt ut non habeant prolem, vel ut extinguant prolem non est matrimonium [...] quia condicio vel pactum de extinguenda vel vitanda prole est contra substantiam et naturam matrimonii, que exigit consensum in carnalem copulam et in prolem non vitandam. [...] Et nota quod si qui sic contrahunt quod non habent voluntatem habendi prolem, non impeditur matrimonium; si vero sic quod habeant voluntatem non habendi, impeditur matrimonium. Similiter, si habent voluntatem vitandi vel necandi prolem. Si ergo contrahunt ut velint non habere, impeditur matrimonium; si vero contrahunt ut non velint habere, non impeditur."

The passage from Huguccio's unpublished Summa is cited by P. Abellán, ibid., p. 22.

Augustine. Gratian himself began to do this when he constructed and developed his central theory of marriage (ordinatio in copulam: see chapter three) without relying on the scheme of the three bona (although he mentions them).<sup>37</sup> An even more outright rejection of the Augustinian scheme to establish the end of marriage was made by Peter Lombard, who placed the purposes (finales causae) of matrimony in three categories: "principal" (of which the first is procreation and the second vitatio fornicationis, i.e., remedium concupiscentiae); "honest" (such as the reconciliation of enemies and the re-establishment of peace); and "less honest" though permissible (beauty, for instance).<sup>38</sup> As can be seen from this, the early terminology of the ends would eventually change and become more precise. But Gratian and Lombard, the initiators, respectively, of the great canonical and theological syntheses of the Middle Ages, had clearly begun to discern between the finality and the bona of marriage. The process would continue, and the primacy of procreation among the ends of matrimony would remain without serious challenge.<sup>39</sup>

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37. See C. Schahl, op. cit., pp. 55-58.

38 Peter Lombard, Liber IV Sententiarum, dist. 30, c. 3-4. And see C. Schahl, op. cit., pp. 62-69.

39 C. Schahl, ibid., p. 87; E. Doronzo, Tractatus Dogmaticus de Matrimonio, pp. 833-834.

## b) Other Ends of Marriage.

After procreation the "remedy for concupiscence" was seen by practically all the medieval authors as a true purpose of marriage. And alongside the remedium concupiscentiae as an end stood a similar one, nearly as frequently admitted: the mutual assistance and solace of the spouses, that is, mutuum adiutorium (or humanum solatium). Gratian mentioned this aspect of marital finality in c. 41, C. 27, q. 1: "The good of marriage [...] was at one time observance of the law; and now it is a remedy for weakness and, for some persons, a human solace."<sup>40</sup> But he gave no commentary. And the twelfth-century canonists and theologians for the most part treated the matter similarly. Mutuum adiutorium was not only a usual result of marriage; it was likewise an end. But the authors of the twelfth century did not develop the notion. Often they reduced it to help in the externals of married life, such as material necessities; or it was seen

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<sup>40</sup> "Nuptiarum bonum [...] aliquando fuit legis obsequium, nunc est infirmitatis remedium, in quibusdam vero humanitatis solatium." Gratian is quoting here St. Augustine, De bono viduitatis, c. 8.

to apply particularly to older persons.<sup>41</sup> Perhaps the sole exception was Hugh of St. Victor. Consistent with his entire theory of marriage, Hugh explicitly rejected the idea that procreation was the primary purpose, although he acknowledged that it held a privileged place. But for him the chief end was the conjugal society itself.<sup>42</sup>

The great theologians of the thirteenth century, however, gave more place to the "secondary ends" of marriage, the bonum coniugum. St. Thomas, while considering the generation of offspring to be the principal purpose,

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<sup>41</sup> See St. Augustine's observation above, p. 59.

For discussions of the "secondary ends" of marriage in the writings of the twelfth-century authors, see R. Weigand, loc. cit.; P. Abellán, op. cit., passim; C. Schahl, op. cit., pp. 72-87; M. Zalba, "Valores morales y espirituales del matrimonio. Jerarquía de ellos a la luz de la razón y de la Revelación", in W. Bertrams et al., De matrimonio coniectanea, pp. 935-937; A. Lanza, "De fine primario matrimonii", loc. cit., pp. 221-224; E. Doronzo, op. cit., pp. 833-838; P. Adnès, Le mariage, p. 83.

<sup>42</sup> Hugh of St. Victor's teaching on marriage is dealt with somewhat more thoroughly below, in chapter three. Actually, there is some discussion among the commentators on his position vis-à-vis procreation. Some believe that he conceded it to be first among the purposes of marriage. Thus G. Le Bras, "La doctrine du mariage chez les théologiens et les canonistes depuis l'an mille", in D.T.C., Vol. 9, col. 2146; F. Carney, The Purposes of Christian Marriage, pp. 155-156. But others disagree, e.g., C. Schahl, op. cit., pp. 43 ss.; P. Abellán, op. cit., p. 73; P. Adnès, op. cit., pp. 84-85. For a brief survey of positions see E. Doronzo, op. cit., pp. 730-731. To hold that Hugh accepted the primacy of procreation seems the more forced interpretation.

recognized the personal values in marriage also. He mentions them in various terms (for example, mutuum adiutorium, amicitia, tota communicatio operum, vita communis in rebus domesticis, mutuum obsequium...in rebus domesticis, consortium communis vitae). St. Thomas does not fully elaborate this personal and "conjugal" dimension of marriage. But he certainly acknowledges it and allows it a place which the canonists and theologians of the previous century did not.<sup>43</sup>

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<sup>43</sup> Some of St. Thomas's major passages dealing with the ends of marriage are: Suppl., q. 41, art. 1; q. 44, arts. 1 and 2; q. 48, art. 2; q. 65, arts. 1 and 5; Summa Theologiae, I, q. 92, art. 2.

There has been extensive discussion, much of it controversial, of St. Thomas's treatment of the secondary, personal ends of marriage. Some of the more important contributions include C. Schahl, op. cit., pp. 109 ss.; and E. Boissard, "Les fins du mariage dans la théologie scolastique", in Revue Thomiste, 49(1949), pp. 289-309. See also S. Pinckaers, "Ce que le Moyen Age pensait du mariage", in Supplément de La vie spirituelle, 20(1967), pp. 426 ss.; A. Lanza, "De fine primario matrimonii", in Apollinaris, 13(1940), pp. 234-240; J. Lyons, The Essential Structure of Marriage, especially pp. 42-43; F. Carney, The Purposes of Christian Marriage, pp. 170-174; C. Schleck, The Sacrament of Matrimony. A Dogmatic Study, pp. 13-14; M.-J. Nicolas, "Remarques sur le sens et de la fin du mariage", in Revue Thomiste, 45(1939), pp. 774-793; M.-J. Gerlaud, "Note sur les fins du mariage d'après S. Thomas", in Revue Thomiste, 45(1939), pp. 764-773; E. Doronzo, op. cit., pp. 848-861; G. de Broglie, "La conception Thomiste des deux finalités du mariage", in Doctor Communis, 30(1974), pp. 3-41.

E. Boissard (loc. cit., p. 300) concludes that for St. Thomas the bonum coniugum is an important consideration and that "around the 'common life' of the spouses all the secondary finalities group themselves, logically order themselves, and consequently can be called a single end, the secondary end of marriage".

The question is complicated by the fact that St. Thomas died before completing his treatment of marriage in

More explicit, perhaps, in his treatment of personal values was St. Bonaventure. While he did not make an orderly presentation of the subject, nor achieve a synthesis of the ends of marriage, he was very conscious of the mutuum adiutorium of the spouses and gave an exalted place to conjugal love.<sup>44</sup> He finds an argument for monogamy, for instance, in the exclusive character of married love:

[...] in marriage there is a certain singular love, in which an outsider does not share; whence every husband is jealous for his wife in this regard, that she love no one else as she loves him in the act [of carnal copula]; and every wife is similarly jealous for her husband regarding the same matter. Therefore in the state of [pure] nature, there would never have been a commonality here [i.e., "group marriage"], even if everything else were common. Similarly, with the coming of grace, which brings it about that all things are in common, this never calls for a wife to be held in common, because of the private love which must exist in marriage [...].<sup>45</sup>

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<sup>43</sup> (cont'd) the Summa Theologiae. Thus we do not have his mature thought on the subject, but mainly the work of his youth in his commentary on the Sentences of Lombard, which forms the matrimonial material of the Supplementum.

For a very favorable treatment of St. Thomas's thought on marriage see E. Schillebeeckx, Marriage: Secular Reality and Saving Mystery, pp. 143-146.

<sup>44</sup> See, for instance, P. Adnès, Le mariage, pp. 85-86; E. Doronzo, op. cit., pp. 843-847; F. Carney, op. cit., pp. 164-165; C. Schleck, op. cit., p. 12..

<sup>45</sup> St. Bonaventure, In IV Sententiarum, dist. 33, art. 1, q. 2: "[...] quod in matrimonio est quidam amor singularis, in quo non communicat alienus; unde naturaliter omnis vir zelat uxorem quantum ad hoc, ut nullum diligat, ut diligat ipsum in actu illo; et omnis uxor similiter zelat

By the end of the thirteenth century the bonum coniugum, the more personal benefits attaching to marriage, were commonly given recognition as being among the purposes of matrimony, subordinate, to be sure, to the primary purpose of procreation, but having nevertheless a value in themselves. The compilers of the Roman Catechism, published in 1566, actually listed the bonum coniugum first among the purposes (causae) of marriage - though it was made clear which purpose (procreation) was initially intended by God; and these purposes were proposed as subjective motives as well as institutional ends:

To be explained now are the reasons for which man and woman should be joined. The first reason is this society itself of the different sexes, called for instinctively by nature, and encouraged by the hope of mutual assistance, whereby each spouse is helped by the other to more easily bear the hardships of life and be able to sustain the infirmities of old age.

The second reason is the desire for offspring, not so much that there be heirs to whom to leave property and fortune, but that they be brought up as participants in the true faith and religion. [...] And this alone was also the reason why God instituted marriage from the beginning. [...]

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45 (cont'd) virum quantum ad hoc: unde stante natura, nunquam fuisset ibi communitas, etiam si cetera essent communia. - Similiter, caritate adveniente, quae facit, omnia esse communia, nunquam facit uxorem communem, propter privatum amorem, qui debet esse in matrimonio [...]."

There is a third reason, which was added to the others after the fall of the first parents, when on account of the loss of the state of justice in which man was created his desires began to rebel against right reason; this [third] reason allows the person who, aware of his own frailty, does not want to fight the battle of the flesh, to use the remedy of marriage to avoid sins of lust. [...]

These then are the reasons, one or the other of which should be proposed to themselves by all who wish to contract marriage piously and religiously, as befits the children of the saints.<sup>46</sup>

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<sup>46</sup> Catechismus ex decreto SS. Concilii Tridentini ad parochos Pii V. Pont. Max. iussu editus, pars 2<sup>a</sup>, cap. 8, De matrimonio, 13-14: "Sed quibus de causis vir et mulier coniungi debeant, explicandum est. Prima igitur ratio est, haec ipsa diversi sexus naturae instinctu expetita societas, mutui auxilii spe conciliata, ut alter alterius ope adiutus vitae incommoda facilius ferre, et senectutis imbecillitatem sustentare queat.

"Altera est procreationis appetitus, non tam quidem ob eam rem, ut bonorum et divitiarum heredes relinquantur, quam ut verae fidei et religionis cultores educantur. [...]  
Atque una haec etiam causa fuit, cur Deus ab initio matrimonium instituerit. [...]"

"Tertia est, quae post primi parentis lapsum ad alias causas accessit, quum propter iustitiae, in qua homo conditus erat, amissionem, appetitus rectae rationi repugnare coepit; ut scilicet, qui sibi suae imbecillitatis conscius est, nec carnis pugnam vult ferre, matrimonii remedio ad vitanda libidinis peccata utatur. [...] Hae igitur sunt causae, quarum aliquam sibi proponere quisque debet, qui pie et religiose, ut sanctorum filios decet, nuptias velint contrahere."

While these causae, or rationes, have something of personal motives about them, it cannot be said that they are presented solely as finis operantis; for they correspond to the accepted trilogy of ends. In addition, this passage in the Roman Catechism is followed by a listing of other reasons for marrying, reasons more clearly identified with subjective motivation, such as beauty, wealth, ancestry, which are labelled as permissible.

Thomas Sanchez (1550-1610), perhaps the greatest authority of his day on matrimonial law (and whose influence extended far beyond the seventeenth century), referred to the common life of the spouses as an "end" of marriage:

[Matrimony] is said to be individuum vitae consuetudinem retinens, that is, enduring, to explain the end of marriage, which is mutual habitation.<sup>47</sup>

It was Sanchez's opinion that the permanent exclusion of this "mutual habitation" (which was more than mere living together) rendered the marriage invalid.<sup>48</sup> While he cannot be accused of having ever lost sight of the procreative finality of the conjugal union (as well as its function in remedium), the aspect of mutuum adiutorium is very much in evidence in the thought of Sanchez. It is a dimension of

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46 (cont'd) Interestingly, there is record of a response of the Holy Office which employed in its argumentation for the possible validity of marriage the "prima ratio" of this passage from the Roman Catechism. The Holy Office said that the unions of certain natives should be initially presumed to be valid because (among other reasons) of the mutual affection and assistance among the partners, which was an indication of true marriage as the Roman Catechism teaches in the passage referred to. S.C.S. Officii, Instructio (ad Ep. S. Alberti), 9 dec. 1874, in P. Gasparri - J. Serédi, Codicis iuris canonici fontes, Vol. 4, pp. 345 ss., especially nos. 11-12.

47 Thomas Sanchez, De sancto matrimonii sacramento, lib. 2, disp. 1, n. 8: "[Matrimonium] dicitur individuum vitae consuetudinem retinens, id est, perseverantem, ut explicetur finis matrimonii, qui est mutua habitatio [...]."

48 Ibid., lib. 5, disp. 10, n. 5. And see below, p. 98.

his notion of "cohabitation", from which the obligations of love and friendship are not absent, obligations which derive from the very nature of marriage.<sup>49</sup> Sanchez did not, of course, give equal juridical value to all facets of this bonum coniugum. He says only that the refusal ab initio to cohabit invalidates marriage and that cohabitation involves a number of elements.

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This short historical conspectus of the ends of marriage has basically illustrated, it seems, the fact of evolution in the apprehension and canonico-theological presentation of those ends. Among the various aspects of matrimonial finality, procreation has almost always held first place. And the "remedial" purpose of marriage (against concupiscence) has received similar recognition by the authors. Alongside this double finality arose another, which can be more or less adequately identified as mutuum adiutorium, or better perhaps, the bonum coniugum, inasmuch as it refers to the human, personal blessings coming from marriage (and in this sense includes even remedium

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<sup>49</sup> For a detailed treatment, see P. Abellán, "El fin del matrimonio según Tomás Sánchez", in Archivo teológico granadino, 2(1939), pp. 35-69.

concupiscentiae). As a finis operis this bonum coniugum was seen to be not just any advantage to be gained from matrimony (since there could be many), but rather that fundamental relationship of solace and assistance which the spouses provided for each other by virtue of their unique life-long companionship. Scripturally it was related to the "helpmate" and companion which Eve was given to be for Adam.

Traditionally it had visible roots in St. Augustine's observation that, at least in the case of older people, it seemed to be sufficient to ensure the honesty of marriage, especially when there were no children.

It was the authors, particularly the theologians, of the thirteenth century who first began to consider seriously the bonum coniugum as an authentic purpose of marriage and to elaborate upon it, although their predecessors of the century before had not been unmindful of it. Still, a specifically canonical formulation and utilization of the "secondary ends" of marriage, such as could be applied directly to the question of matrimonial validity, is not much in evidence before the Code of Canon Law. With few exceptions, perhaps most notably Thomas Sanchez, the canonists themselves did not find much juridical relevance in the bonum coniugum. Sanchez himself limited, at least in so many words, its canonical importance to the question of cohabitation (and

even this would be rejected by most commentators of the Code of Canon Law, as will be seen). When the Codex Iuris Canonici was promulgated in 1917, its canon 1013, #1 formulated the scheme of the ends of marriage as "primary" and "secondary": the primary end was the procreation and education of children; the secondary, mutual help and the remedy for concupiscence (and this formulation by the Code was, according to U. Navarrete, the first arrangement in this precise manner of the ends of marriage in an official Church document).<sup>50</sup> Of these two (or three) ends of marriage, only the first, it seems, had real legal value.

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<sup>50</sup> U. Navarrete, "Structura iuridica matrimonii secundum Concilium Vaticanum II", in Periodica, 56(1967), p. 368.

## CHAPTER III

### THE CLASSICAL FORMULATION OF THE NATURE OF CHRISTIAN MARRIAGE: THE OBJECT OF MATRIMONIAL CONSENT

The question of the object of matrimonial consent is perhaps the most significant of the three historical approaches to the nature of marriage which form the subject matter of this chapter and the preceding one (definition - finality - object of consent). Historically it was this problem around which revolved the attempts of many of the medieval canonists and theologians to determine what was essential - and thus sufficient - for a valid, indissoluble marriage to come into existence. Canonically the object of consent is an expression (and possibly the most accurate expression) of the juridical essence of marriage.

Behind the canonico-theological inquiry of the twelfth and thirteenth centuries into the object of consent was the problem of copula vs. consensus. The question whether consent alone sufficed for a valid and indissoluble marriage, or whether consummation was additionally required, was related, in theological and juridical terms, to the question: To what is marriage consent directed, to the copula or to something else? And if to something else, how was this "something" to be identified? To say that marriage consent was directed to marriage was to beg the question, at

least for the authors of the time. For it was the fundamental and specifying element of marriage itself which was one of the objects of their investigation. For most of the twelfth-century the question remained open: the School of Paris, consisting mainly of theologians and typified by Peter Lombard, contended that consent alone brought about a perfect marriage; the School of Bologna, more juristic than theological, and whose most prominent representative was Gratian, did not consider marriage "complete" until consummation had taken place. The decisions of Pope Alexander III which held for the existence of valid marriage from the moment of the giving of consent de praesenti,<sup>1</sup> while favoring the consensualist view, were in some respects a compromise (traces of which exist even today in canon 1119 of the Code of Canon Law); and whereas Alexander III's decisions would eventually provide a practical solution for a number of cases of ratified but unconsummated marriage, they did not solve (nor did they address) the theoretical question posed by the authors: What is the object of matrimonial consent?

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<sup>1</sup> For a very concise but readable account of the matter, see J. Finnegan, "When Is a Marriage Indissoluble? Reflections on a Contemporary Understanding of a Ratified and Consummated Marriage", in The Jurist, 28(1968), pp. 313-319.

## 1. Twelfth-Century Authors.

As is well known, it was Gratian who was the most influential exponent of the theory that carnal copula is constitutive of marriage. He did not deny, of course, that consent itself was necessary: sexual intercourse alone was by no means identical with marriage. But consent to copula had to be present: the unconsummated marriage was less than a full marriage. Marriage consent is therefore consensus carnalis copulae.<sup>2</sup> If this were not the case, in Gratian's argumentation, then marriage is more or less simple cohabitation; but people can surely live in the same house without being married:

It is asked, which consent effects marriage, consent to cohabitation, or to carnal copula, or to both? If consent to cohabitation makes a marriage, then a brother can contract marriage with his sister. If it is carnal copula, then there was no marriage between Mary and Joseph.<sup>3</sup>

Gratian solves the problem - at least to his own satisfaction - of the marriage of the Blessed Virgin and Saint Joseph by explaining in the following canon (c. 3,

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<sup>2</sup> For a description of Gratian's position see especially J. Alesandro, Gratian's Notion of Marital Consummation.

<sup>3</sup> Decretum, c. 2, C. 27, q. 2: "Sed queritur, quis consensus facit matrimonium, an consensus cohabitationis, an carnalis copulae, an uterque? Si cohabitationis consensus facit matrimonium, tunc frater cum sorore potest contrahere matrimonium; si carnalis copulae, inter Mariam et Joseph non fuit coniugium."

C. 27, q. 2) that Mary's vow of virginity was rather a promise made within her heart; and when she consented to marry Joseph, she did not exclude from this consent the possibility of copula; she instead put the disposition of the matter into God's hands. The decision not to have sexual relations, says Gratian, was a mutual decision of Mary and Joseph; thus their marital consent was not vitiated, and at the same time their virginity was preserved.<sup>4</sup>

And so for Gratian the object of matrimonial consent is carnal copula. Otherwise, as he notes (and as later authors would comment upon), one would have to say that cohabitation is the object of consent; and this would lead to absurdities, as in the case of brother and sister. It may be noted, however, that the very way in which Gratian posed the question (either cohabitation or copula) determined in large part the answer. Were there no other possibilities besides cohabitation and consummation? If Gratian did know of other options to introduce, he obviously did not think they would be of value for the canonist: the canonist had to have a tangible norm by which to determine whether a marriage had taken place, and the cohabitation-copula alternative

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<sup>4</sup> Nevertheless in Gratian's theory the marriage of the Blessed Virgin and St. Joseph was never more than a matrimonium initiatum. It did not become fully coniugium. See J. Alesandro, op. cit., pp. 6-7, 83.

provided for this kind of norm. Even so, Gratian knew full well that not every act of sexual intercourse was sufficient for marriage: it had to be marital intercourse, the consummation of a relationship which had been previously consented to by both parties. The consent preceded the act and gave it its meaning. Otherwise it would be fornication, not marital relations.

Gratian did not attempt to analyze further or define this "marital" quality of the man-woman relationship. Perhaps he did not think it necessary to do so, or even possible. Speaking of the union of Mary and Joseph, for instance, in the passage just mentioned (c. 3, C. 27, q. 2), he says that the "consent to cohabit and to maintain an undivided way of life (individuum vitae consuetudinem retinendi) made them spouses". He clearly distinguishes here not only between individua vitae consuetudo, which is marriage itself, and cohabitation, but also between individua vitae consuetudo and sexual intercourse: the Roman expression describes the union of the Blessed Virgin and St. Joseph, a union without carnal copula.

And later, dealing with the Old Testament union of Jacob and Leah in his treatment of error personae (C. 29, q. 1), Gratian defends the validity of their marriage by asserting that marital consent can either precede or follow

carnal copula (it followed it in this instance, he says). In either case this consent is directed toward individua vitae consuetudo, and thus it is authentically marital.<sup>5</sup> Once again Gratian implicitly acknowledges the distinction between the marital copula and the marriage relationship itself, for which he uses the Roman phrase. But the latter remains unanalyzed and non-juridical. The juridical object of marital consent is the copula carnalis.

Practically the completely opposite position to Gratian's on the nature of the object of consent was that of a contemporary of his, Hugh of St. Victor. If Gratian could be accused of being too "physical", Hugh's notion of marriage was certainly a "spiritualized" one. In common with most medieval authors Hugh distinguished between marriage as it was before the Fall of the first parents and afterwards.<sup>6</sup>

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5 C. 29, q. 1: "Consensus est alius precedens, alius subsequens. Precedit consensus quando ante carnalem copulam in individua vitae consuetudinem uterque consentit; subsequitur, quando post concubinalem sive fornicarium coitum consentiunt in idem. Iacob ergo et Liam non fecit coniuges precedens consensus, sed subsequens; nec tamen ex primo concubitu fornicarii iudicantur, cum ille maritali affectu eam cognoverit, et illa uxorio affectu sibi debitum persolverit [...]."

6 The marriage doctrine of Hugh of St. Victor is contained in two treatises, De sacramento coniugii (PL 176, 479-520) and De B. Mariae virginitate (PL 176, 857-876). For commentary see among others E. Schillebeeckx, Marriage: Secular Reality and Saving Mystery, pp. 79-80, 117-122; P. Abellán, El fin y la significación sacramental del matrimonio desde S. Anselmo hasta Guillermo de Auxerre, pp. 72-74; A. Lanza, "De fine primario matrimonii", in Apollinaris, 13(1940), pp. 225-227.

For the majority of the Scholastics, marriage was instituted before the Fall in officium, that is, as a duty (primarily the duty to procreate). After the Fall marriage was also intended in remedium, to alleviate concupiscence. But Hugh further distinguished between coniugium and officium coniugii. The latter remained the obligation of mankind to propagate the human race, which required sexual intercourse. But the former, simple coniugium, was the marital society in itself, in which carnal copula was neither required nor always to be desired.<sup>7</sup> In Hugh's theory the distinction between coniugium and officium coniugii was so pronounced that marriage actually involved two acts of consent, one to the marital society of two persons who lived in a communion of hearts and minds and who loved each other (spiritually, but not necessarily sexually); the other consent was directed to sexual intercourse.<sup>8</sup> These two acts of consent, consensus coniugalis and consensus coitus, ordinarily coincided. But they need not. No one was bound to engage in marital copula, at least when its exclusion was mutually agreed upon. Thus

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7 De B. Mariae virginitate, c. 4: PL 176, 874: "In coniugio siquidem duo sunt: sacramentum coniugii, et sacramentum coniugalis officii. Hoc est coniugium et coniugii officium utrumque sacramentum. Coniugium est in foedere dilectionis. Coniugii officium est in generatione prolis."

8 See, for example, C. Schleck, The Sacrament of Matrimony, p. 12.

the marriage of the Blessed Virgin and St. Joseph was a complete marriage. And more, it was the perfect marriage, the ideal, in Hugh's opinion. Mary and Joseph were united in a love which was without imperfection; they entered a conjugal society of exquisite closeness and mutual care; and they did not have sexual relations.

What was, then, for Hugh of St. Victor the object of matrimonial consent? It was the coniugalis societas, the community of conjugal life and love. The copula was not necessary; it was not even - if one wished the perfect marriage - desirable. And it did not belong to the essence of marriage.

Hugh was not unaware that marriage entails a bonum fidei, a requirement of sexual fidelity. This was included in his notion of "mutual self-giving" of the spouses. This mutual surrender had for Hugh two aspects. One, which is essential, supposes the exclusivity and inseparability of the conjugal union. The other, accidental (in that copula is not essential to marriage), comprises the disposition to engage in the conjugal act with the spouse and only with him. Thus was the requirement of fidelity preserved.<sup>9</sup> Hugh likewise addressed the objection that if copula carnalis were not of

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<sup>9</sup> De B. Mariae virginitate, c. 1: PL 176, 860. And see T. Rincón, El matrimonio, misterio y signo. Siglos IX-XIII, p. 162.

the essence of matrimony, then persons of the same sex might marry. He answered, interestingly, that conjugal love is possible only between men and women not because of their sex, but because of their different natures.<sup>10</sup>

And so it is evident that in the teaching of Hugh of St. Victor marriage can be said to be essentially a consortium omnis vitae. It is a conjugal society in which the emphasis is placed not upon any factor extrinsic to the marriage relation itself, not even upon any "purpose" (including procreation), but rather upon the quality of the relationship of the spouses with each other. This relationship is primarily the partners' love for each other, their dilectio (and ultimately their love for God). Hugh of St. Victor was not without influence on other theologians. He was one of the very few of his time to give a central place to conjugal love and to consider marriage explicitly as a personal relationship. But in doing so he isolated to a great extent the meaning of the marital community from what people actually did and intended when they married; that is,

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<sup>10</sup> De B. Mariae virginitate, c. 4: PL 176, 876: "[...] et tamen amor conjugalis non propter sexum dissimilem sacramentum est, sed propter naturam differentem. Non enim secus [sexus], sed natura disparem in alterutrum charitatem amori tribuit, et tamen sexus inaequalitatem naturae discernit. Casta enim dilectio non ex tali sexu aliter afficitur, sed in tali sexu ex tali natura."

he attempted to remove to the sphere of the "incidental" the sexual dimension of marriage. As a result he would have little direct effect upon the formulations of the canonists: his theology of marriage was too "disincarnate".

Peter Lombard, whose Libri IV Sententiarum inaugurated the Scholastic synthesis of theology and whose subsequent influence was immense, used Hugh of St. Victor and Gratian as his primary sources for marriage.<sup>11</sup> And while Lombard was more properly a theologian than a canonist, his treatment of marriage was as much juridical as theological, if not more so.<sup>12</sup>

Although Lombard insisted on the strict consensus theory of marriage in opposition to Gratian, he did not make a radical distinction, as did Hugh, between marriage as a conjugal society and marriage as a sexual union. As Hugh of St. Victor had done before him, Lombard contrasted the consensus coniugalis societatis and the consensus cohabitationis vel carnalis copulae; but he did not on that account speak of

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<sup>11</sup> On the influence in particular of Hugh of St. Victor on Lombard, see G. Serrier, De quelques recherches concernant le mariage contrat-sacrement, et plus particulièrement de la doctrine augustinienne des biens du mariage, p. 175; also G. Eransen, "La formation du lien matrimonial au Moyen Age", in R. Metz - J. Schlick, eds., Le lien matrimonial, p. 119.

<sup>12</sup> G. Le Bras, "La doctrine du mariage chez les théologiens et les canonistes depuis l'an mille", in D.T.C., Vol. 9, col. 2152.

two completely different kinds of marriage, nor did he refer to "two sacraments" in the manner of Hugh. Rather he saw in marriage a twofold union, of married love and of carnal intercourse.<sup>13</sup> Likewise Lombard did not emphasize, as did Gratian, the difference between the consummated and the unconsummated marriage; his central thesis was the distinction between marriage contracted per verba de praesenti and the promise of marriage per verba de futuro.<sup>14</sup>

What then was Lombard's position on the object of matrimonial consent? He deals with the question explicitly, in the manner of Gratian, in chapters three and four of distinction 28:

Here the question is put: "Since consent de praesenti effects marriage, what is the object of that consent, carnal copula, or cohabitation, or both? If consent to cohabitation makes marriage, then brother can contract marriage with sister; if it is carnal copula, then there was no marriage between Mary and Joseph [...]."

Let us say, then, that neither consent to cohabitation, nor to carnal copula, effects marriage, but consent to the conjugal society (consensus coniugalis societatis) [...].

Therefore when man and woman agree to say "I take you for my wife", and "I take you for my husband", in these words or in others signifying the same thing there is expressed

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<sup>13</sup> E. Schillebeeckx, Marriage: Secular Reality and Saving Mystery, pp. 82-83, 123.

<sup>14</sup> G. Le Bras, loc. cit., col. 2153.

consent not to carnal copula, nor to bodily cohabitation, but to a conjugal society (coniugalis societatis); for this reason it is their duty to live together, unless perchance by a mutual vow for religious purposes they are bodily separated, for a time or permanently.<sup>15</sup>

For Peter Lombard, then, the object of matrimonial consent is literally the "conjugal society". This society is not to be confused with either cohabitation or sexual intercourse, though it normally includes both. A brother and sister, for instance, cannot ever be man and wife, even when they live together: theirs would be a "societas", but not a "coniugalis societas". On the other hand the Blessed Virgin and St. Joseph, preserving their virginity, were truly man and wife because their association was "marital": it

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<sup>15</sup> Peter Lombard, Libri IV Sententiarum, dist. 28, cc. 3-4 (Editio Ad Claras Aquas, tom. 2, pp. 927-928):

"Hic quaeritur, 'cum consensus de praesenti matrimonium faciat, cuius rei consensus sit ille, an carnalis copulae, an cohabitationis, an utriusque. Si cohabitationis consensus matrimonium facit, tunc frater cum sorore, potest contrahere matrimonium; si carnalis copulae, tunc inter Mariam et Ioseph non fuit coniugium [...]."

"Dicamus, igitur, quod consensus cohabitationis, vel carnalis copulae non facit coniugium, sed consensus coniugalis societatis [...]."

"Cum igitur sic conveniunt, ut dicat vir: Accipio te in meam coniugem, et dicat mulier: Accipio te in meum virum; his verbis vel aliis idem significantibus exprimitur consensus non carnalis copulae, vel cohabitationis corporalis, sed coniugalis societatis; ex qua oportet eos cohabitare, nisi forte cause religionis pari voto corporaliter separentur, vel ad tempus, vel usque in finem."

was a "conjugal society".

Lombard did not attempt to develop further the details of his object of consent. In all likelihood he believed that the coniugalis societas resisted much deeper analysis. But that it was a unique relationship that could exist only between husband and wife was clear enough to him. And it was clear enough to later authors also, as will be seen shortly.<sup>16</sup>

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<sup>16</sup> The three authors chosen to represent the twelfth century, Gratian, Hugh, and Lombard, were selected because of their obvious importance and - at least in the case of Gratian and Lombard - their subsequent influence.

G. Fransen says that for the canonists and theologians of the twelfth century the content of matrimonial consent was not unanimously defined. For some it was the "societas coniugalis", of which carnal union is but an unnecessary consequence; for others the consensus in copulam was essential and constitutive. "La formation du lien matrimonial au Moyen Age", loc. cit., pp. 124-125.

The followers of Gratian were by and large insistent on the necessity of consent to sexual relations. Huguccio, for instance, one of Gratian's most renowned glossators, writing near the end of the twelfth century, taught that matrimonial consent is a "consensus in carnalem copulam". See J. Dauvillier, Le mariage dans le droit classique de l'Eglise depuis le décret de Gratien (1140) jusqu'à la mort de Clément V (1314), p. 84.

One author of interest is "Master Simon", otherwise unknown, who wrote a treatise on the sacraments between 1145 and 1160. From him is named the "School of Master Simon", a school formed around this treatise. Master Simon explained the object of matrimonial consent as follows:

"Querī autem solet, quis sit assensus qui coniugium faciat, cum non omnis id facere videatur. [...] Assensus ergo, qui coniugium facit, est consensus inter legitimas personas secundum tempus in idem de carnali copula et de iure coniugii pro posse servando. [...] 'In idem de carnali copula' [dicitur], ut scilicet ambo in eadem voluntate

## 2. Thirteenth-Century Authors.

The thirteenth century saw a partial solution given to the question of the object of matrimonial consent, which had been posed in the preceding century by Gratian, Hugh of St. Victor, and Peter Lombard, and answered by them in different ways. The crux of this partial solution lay in the distinction between the potestas corporis and the usus corporis, the right to carnal copula and its actual use. By the end of the thirteenth century, at least, the distinction was admitted by all.<sup>17</sup> Thus it was commonly accepted that marriage entailed the giving and receiving of a ius in carnalem copulam; the remainder of the solution, however, still awaited agreement: do spouses consent principally - or only - to the ius in carnalem copulam, or rather to something else?

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16 (cont'd) convenient de carnali copula sive facienda sive non facienda. [...] 'De iure coniugii pro posse servando': Ius coniugii est, ut simul cohabitent; ut invicem se ament, quod pro posse suo observare debent. Hic ergo talis assensus coniugium facit" (Maitre Simon et son groupe "De sacramentis". Textes inédits, ed. H. Weisweiler, pp. 49-51).

Thus for this author the object of consent is both carnal copula and the "ius coniugii" the second of which involves cohabitation and mutual love. See also T. Rincón, El matrimonio, misterio y signo. Siglos IX-XIII, pp. 170, 175.

17 See for instance J. Dauvillier, op. cit., p. 85.

The answer of St. Thomas, like most of the theologians of the era, was not without nuance. Marriage, he explained (Suppl., q. 44, art. 1), is in the category of a coniunctio, a relationship, a union. It is a relationship specifically marital in that it is directed toward procreation and toward domestic life (vita domestica). He later addresses himself to the central question, the same question posed by Lombard: Is matrimonial consent in fact consent to carnal copula? He answers:

It must be said that the consent which effects marriage is consent to marriage [!], because the proper effect of a will act is that very thing which is willed (ipsum volitum). Whence as carnal copula is related to marriage, to that extent is the consent which causes marriage directed to carnal copula. Now marriage [..] is not essentially the carnal relationship itself, but a certain association of man and wife in view of carnal copula and the other consequences of being man and wife (et alia quae ex consequenti ad virum et uxorem pertinent), in accordance with which they are given power over each other with respect to carnal copula. And this association is called the conjugal union. Whence it is clear that they have spoken correctly who have said that to consent to marriage is to consent to carnal copula implicitly, not explicitly.<sup>18</sup>

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<sup>18</sup> St. Thomas, Supplementum, q. 48, art. 1, in corp.: "Dicendum quod consensus qui matrimonium facit, est consensus in matrimonium, quia effectus proprius voluntatis est ipsum volitum. Unde sicut carnalis copula se habet ad matrimonium, ita consensus qui matrimonium causat, est in carnalem copulam. Matrimonium autem, ut supra dictum est, non est essentialiter ipsa coniunctio carnalis, sed quaedam associatio viri et uxoris in ordine ad carnalem copulam et alia quae ex consequenti ad virum et uxorem pertinent,

St. Thomas's position, then, is similar to that of Lombard (the societas coniugalis); but he expresses it somewhat differently and with some slight elaboration. He says by his deliberate tautology (consent to marriage is consent to marriage) that the object of consent is carnal copula only if carnal copula is the same thing as marriage. But it is not. Marriage involves other things besides - it is a unique sort of association. It does, to be sure, give the spouses the potestas for sexual relations; and so the object of consent includes a ius in corpus; but this ius indicates that sexual intercourse is more correctly seen as implicit in marriage consent, not explicit.

Specifically, what is the place of carnal copula in marriage? St. Thomas has dealt with this somewhat earlier (Suppl., q. 42, art. 4). Sexual intercourse belongs to the "use" (usus) of marriage, but not to its "very essence" (ipsum esse). In Thomistic terminology it is part of the "integrity" of marriage, not according to its "first perfection", its essence, but in its "second perfection",

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18 (cont'd) secundum quod eis datur potestas in invicem respectu carnalis copulae. Et haec associatio coniugalis copula dicitur. Unde patet quod bene dixerunt illi qui dixerunt quod consentire in matrimonium est consentire in carnalem copulam implicite, non explicite."

its operation.<sup>19</sup> This is not to deny sexual intercourse a significant place in the notion of what marriage is - and in the object of matrimonial consent. Carnal copula is for St. Thomas, in fact, an important element. It is that which perhaps most noticeably specifies marriage as a conjugal community (or more precisely, it is the right to the copula). It is not, though, the marital society itself, which involves wider realities and obligations. Exactly what these wider realities and obligations are, St. Thomas does not elaborate very much.<sup>20</sup> Marriage, as he says, is marriage, a relation, a coniunctio of man and wife. It is sexual, but sexual relations do not exhaust its meaning.

The thought of St. Bonaventure (ca. 1217-1274) is similar to that of St. Thomas. For him sexual intercourse belongs to the integrity of marriage not quoad esse necessitatis, but quoad esse completionis sive plenitudinis

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<sup>19</sup> Supplementum, q. 42, art. 4: "Utrum carnalis commixtio sit de integritate matrimonii: [...] Dicendum quod duplex est integritas: una quae attenditur secundum perfectionem primam, quae consistit in ipso esse rei; alia quae attenditur secundum perfectionem secundam, quae consistit in operatione. Quia ergo carnalis commixtio est quaedam operatio sive usus matrimonii, per quod facultas ad hoc datur; ideo erit carnalis commixtio de secunda perfectione matrimonii, et non de prima."

<sup>20</sup> See, however, the discussion of St. Thomas's treatment of the secondary ends of marriage above, pp. 65-66, especially note 43.

(In IV Sent., dist. 26, art. 2, q. 3). And he answers the question of the object of matrimonial consent by asserting that the consent which effects marriage

is consent to potestas over one another's body [...]. Note that the potestas corporis is given in one manner in the contracting of marriage, and in a different manner in its consummation. In the contracting it is given to one person with the result that it cannot be given to another while that first person is still living; this giving also means that the partner has the right to request, and the obligation to give [the marital debt] to the other when it is requested, unless one has died to the world through a solemn vow of chastity and entrance into religion. [...]

On the other hand, in the consummation of marriage the potestas is completely handed over, with the result that by neither private nor solemn vow can the request for the debitum be denied.<sup>21</sup>

Thus Bonaventure too has made the distinction between the potestas carnalis copulae and its usus. In addition he has linked this with the distinction between marriage in its contracting and in its consummation. His position practically coincides with that of St. Thomas, although Bonaventure

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<sup>21</sup> St. Bonaventure, In IV Sententiarum, dist. 28, art. unicus, q. 6: "Et propterea dicendum, quod consensus, qui matrimonium facit, est consensus in mutuum suorum corporum potestatem [...]. Sed notandum, quod aliter datur potestas corporis in contractione matrimonii, aliter in consummatione. In contractione ita datur uni, ut non possit, illo vivente, dari alii; ita etiam datur illi, ut ius habeat petendi, et necesse sit reddere petenti, nisi moriatur mundo per votum castitatis solemne et ingressum in religionem. [...] In matrimonii autem consummatione omnino transfertur potestas, ita quod nec voto privato nec solemni possit petenti debitum adversari."

perhaps gives even more emphasis than Aquinas to the place of carnal copula and has less to say about the essence of marriage as a conjugal society. He acknowledges, of course, that the marital union is more than an association directed to sexual intercourse. And he does speak in sympathetic terms of conjugal love.

The theology of Duns Scotus on the nature of marriage and the object of matrimonial consent continues the line of thought of St. Thomas and St. Bonaventure. Scotus perhaps writes at more length than the other two, however, on the distinction between the ius copulae and the usus iuris. He also stresses more heavily the role of sexual intercourse in marriage consent. Speaking of the marriage of the Blessed Virgin, he acknowledges that "in the marriage contract there is a mutual giving of the bodies for carnal copula", but says that "it is only with an implicit condition, namely, if it is requested".<sup>22</sup>

More specifically, Scotus's definitions of marriage define clearly what is for him the object of consent:

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<sup>22</sup> Duns Scotus, Quaestiones in IV Sententiarum, dist. 30, q. 2: "Respondeo, in contractu matrimoniali est mutua datio corporum ad carnalem copulam, non nisi sub conditione implicita, scilicet si petatur."

Marriage is an indissoluble bond between man and wife arising from the mutual transferral of power over each other's body for the procreation and right education of offspring.

The contract of marriage is the mutual transferral by man and wife of their bodies for perpetual use in the procreation and right education of offspring.<sup>23</sup>

Not every theologian of the thirteenth century, however, was as oriented to carnal copula as Duns Scotus or as reticent about identifying the elements making up the conjugal society as Bonaventure and Aquinas. William of Auxerre (+ ca. 1231), a theologian whose Summa aurea in quattuor libris Sententiarum was well known (and was cited by Bonaventure on marriage: In IV Sent., dist. 28, art. un., q. 6), addressed the usual question of whether it is consent to sexual relations or consent to cohabitation which makes marriage. And he answered in this manner:

We say first of all that neither consent to cohabitation, nor consent to carnal copula, is the efficient cause of marriage; but it is consent to the conjugal union (in coniugalem copulam); and the conjugal union is composed of a number of things, such as cohabitation; and carnal copula; and mutual service (mutuum obsequium); and the mutual power over the body [...].<sup>24</sup>

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23 Ibid., dist. 26, q. unica. See above, p. 57, note 30.

24 William of Auxerre, Summa aurea, fol. 286: "De consensu cause efficientis matrimonii. Alia questio. Queritur postea quis consensus sit causa efficiens matrimonii, aut consensus ad cohabitandum perpetuo, aut consensus in carnalem copulam. [...]. Solutio. Ad primum dicimus quod

William of Auxerre was not as analytical as he might have been about the nature of the marital association. But he expressed the common answer of the thirteenth century in a slightly different way. And he made it clear that the conjugal union (and not carnal copula) which is the object of consent includes a number of elements (multa comprehendit), among which is life in common and "mutual assistance".<sup>25</sup>

Another thirteenth-century theologian who dealt explicitly with the nature of the marital society was William of Auvergne (+ 1249). Calling marriage "the bond of the perfect society", he sets himself to analyze its makeup:

[...] it remains for us to determine the elements (partes) of this society. The first of these is [communion] in the true religion itself, which is the right worship of the divinity. [...] The second element of the conjugal society is a communion of bodies for the conjugal task, namely generation. The third is a communion of temporal goods, in which it is not lawful for one [spouse] to defraud the other. The fourth is a communion of physical presence (communio corporum priorum), which is to care

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24 (cont'd) nec consensus ad cohabitandum; nec consensus in carnalem copulam; est causa efficiens matrimonii; sed consensus in coniugalem copulam; et coniugalis copula multa comprehendit scilicet cohabitationem et carnalem copulam; et mutuum obsequium; et mutuam potestatem corporis; quia vir non habet potestatem sui corporis; sed mulier; nec econverso."

25 William of Auxerre's opinion is cited with some approval, for instance, by Hugh of St. Cher. See P. Abellán, "La doctrina matrimonial de Hugo de San Caro", in Archivo teológico granadino, 1(1938), p. 39.

for and serve each other, and to provide for each other in health as well as infirmity. The fifth is a communion of offspring, and of the entire family, which is to bring up, to educate, to govern, and to provide for the future. [Marriage] is therefore a perfect society from these five communions; and it consists integrally and totally in these; and whoever bind themselves to each other by the bond of matrimony oblige themselves to this society and to all its parts.<sup>26</sup>

Thus William of Auvergne finds five elements of community, five communiones, in the marital society. They are the community of "true religion"; of procreation; of temporalities; of aid and assistance (corporum propriorum, with his explanation of this phrase); and of the total

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<sup>26</sup> William of Auvergne, De sacramento matrimonii, caput 6, in Opera omnia, Vol. 1, pp. 520-521: "Et quia matrimonium superius diximus vinculum perfectae societatis, restat nobis determinare partes societatis istius. Harum ergo prima est in ipsa vera religione, quae est divinae honorificentiae debitus cultus. [...] Secunda pax [pars?] coniugalis societatis est communio corporum ad opus coniugale, seu generationis. Tertia communio bonorum temporalium, quibus non licet alterum fraudem facere. Quarta communio est corporum propriorum, quae est custodiendi se invicem ac serviendi, providendique sibi invicem tam in sanitate, quam in infirmitate. Quinta est communio hominum liberorum, totiusque familiae, quae sunt educatio, eruditio, regnum, et in posterum provisio. Est ergo perfecta societas ex his quinque communionibus, et in his integre, totaliterque consistit, et ad istam societatem se obligant, ad omnesque partes ipsius quicumque matrimoniali vinculo sibi invicem astringuntur."

upbringing of and provision for offspring.<sup>27</sup> All these elements of marriage are essential, he asserts, and all are included in the vinculum assumed by those who marry. William of Auvergne was unusual for his time, more than likely, in the detail of analysis he devoted to the nature of the conjugal society. And not being a jurist, he did not propose these elements as "canonical marks". Nor is there evidence of his opinion in this matter being taken up by the canon lawyers. However, he represents his era, the classical age of law and theology, in seeing marriage to be much more than consensus in carnalem copulam.<sup>28</sup> He and his contemporaries, including the "great theologians" such as St. Thomas and St. Bonaventure, taught that marriage and the object of matrimonial consent were fundamentally an association of man

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27 A comparison of William of Auvergne's five communiones with G. Lesage's five elements of the "community of conjugal life" (the capacity for personal equilibrium; for interpersonal and heterosexual friendship; for conjugal collaboration; for responsibility in temporalities; for parenthood) reveals a striking similarity, especially interesting considering the span of over seven hundred years between the two formulations. See G. Lesage, "Evolution récente de la jurisprudence matrimoniale", in *Société Canadienne de Théologie*, Le divorce, pp. 47-48.

28 See, for instance, G. Le Bras, "La doctrine du mariage chez les théologiens et les canonistes depuis l'an mille", in D.T.C., Vol. 9, col. 2186, who says that in the thirteenth century the answer of "all the doctors" is clear: marriage consent is directed to the establishment of a conjugal society, which is neither carnal copula nor simply cohabitation.

and wife involving various (if usually unspecified) relationships and obligations. It can be said without exaggeration that marriage was for these authors a type of consortium omnis vitae. For the most part, though, these various conjugal relationships were not translated into juridical language. Perhaps the theologians and canonists did not believe they could be.

The conclusions reached by the Scholastics about the "essence" of marriage and their consequent formulations of the object of matrimonial consent would be received almost in toto by subsequent authors and would become the "common doctrine". There were a few later canonists who attempted to give greater precision to some of the obligations implicit in the notion of the "conjugal society". D. Covarruvias (1512-1577), a jurist of some standing, would assert that the object of marriage consent included the spouses' living together.<sup>29</sup> This was taken up with more insistence and elaboration by Thomas Sanchez. While acknowledging the object of matrimonial consent to be the potestas ad carnalem copulam,<sup>30</sup> he placed the essence of matrimony in the vinculum,

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<sup>29</sup> D. Covarruvias, De matrimoniis, pars 2, caput 3, n. 1, in Opera omnia.

<sup>30</sup> Sanchez, De sancto matrimonii sacramento, lib. 2, disp. 28, n. 3; lib. 5, disp. 10, n. 2.

the (juridical) relationship by which the spouses are bound;<sup>31</sup> and he considered as part of that vinculum the obligation of husband and wife to maintain a common abode.<sup>32</sup> Sanchez considered the cohabitation of the spouses so important that its initial and permanent exclusion nullified the contract; and cohabitation involved for him not simply living under the same roof, but also "sitting at the same table and sleeping in the same bed".<sup>33</sup>

One even finds the personal community of man and wife given such emphasis that the right to sexual intercourse was rejected as being in every case a necessary component of matrimonial consent. This was the position of the canonist Basil Ponce de Leon ("Pontius", 1570-1629). While somewhat widely quoted, he does not seem to have been frequently followed in his assertion that "what is required for the essence of marriage is only this, that there be a mutual coniunctio of wills in a natural society of life between persons of different sex".<sup>34</sup> Interestingly, Ponce de Leon

31 Ibid., lib. 2, disp. 1, n. 6; lib. 2, disp. 26, n. 3.

32 Ibid., lib. 9, disp. 4, n. 2.

33 Ibid.: "Haec autem obligatio non tantum est in eadem domo habitandi, sed etiam ad eandem mensam accumbendi, in eodem thoro iacendi." See also ibid., nn. 2-4.

34 Pontius, De sacramento matrimonii, lib. 7, cap. 47, n. 1: "Id quod ad essentiam contractus matrimonii requiritur, tantum est, quod sit mutua coniunctio animorum in naturalem vitae societatem cum diversitate sexus."

was a latter-day disciple of Hugh of St. Victor and attempted to revive Hugh's central theory of marriage, that is, that sexual union was not essential. Despite his limited influence, Ponce de Leon bore witness, albeit in an exaggerated way, to the tradition which saw in marriage a personal community of the spouses and which refused to understand or define it solely in sexual terms.<sup>35</sup>

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As was said in the Introduction, the concept of the consortium omnis vitae is initially understood in this study to be a description of marriage as something over and above the sexual, generative relationship (though not necessarily excluding it). The expression is taken in this investigation to refer to the union of husband and wife as it differs from every other human association, not just in its procreative aspect, but also in the relationship of the spouses to each other.

With this understanding, the notion of marriage as a consortium has been seen to have some relation to the

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<sup>35</sup> His argumentation is given at some length in ibid., lib. 1, cc. 17-18. Ponce de Leon also gave a quite knowledgeable explanation of the original meaning of the definition of Modestinus, with citations from ancient Latin authors and the opinions of some of his contemporaries: ibid., lib. 1, c. 2, nn. 4-10.

secondary ends of marriage, as they were historically developed and as they now stand in the Code of Canon Law. The consortium is also a concept which underlies the "traditional" definition of marriage given through the centuries, which is originally the definition of Roman law (especially that of the Institutes of Justinian, but also of Modestinus). From the viewpoint of history, however, neither the canonists nor the theologians, in their analysis, development, and use of the "secondary ends" or of the definition of marriage, gave much juridical value to that idea of consortium omnis vitae. It was commonly seen and accepted to be part of the fundamental makeup of marriage, but was, for the most part, not recognized as having great canonical significance. The procreative dimension, as expressed both in the definition and in the purpose of marriage, overshadowed all other aspects.

When it came to identifying the object of matrimonial consent, however, the authors arrived eventually at the almost unanimous conclusion that the heart of marriage was the "conjugal society" or the "marital association", an association which was not adequately described by carnal copula, although it was certainly ordered to it and ultimately specified by it. The essence of marriage lay not in procreation nor in the physical acts which led to

procreation, but rather in a conjugal community which included the possibility of offspring, and which included other, "more personal", elements as well. Still, these "other elements", some of which could be listed (such as mutual love, the sharing of the necessities of life, living together, etc.), were not easily suited to being inserted within legal categories and being made the object of legal obligations. Only infrequently and with hesitation did canonists and theologians assert that these "more personal" elements of marriage - which may be called aspects of the consortium - could be considered fully juridical, notwithstanding their importance for a doctrinally complete understanding of marriage. And so, in short, the consortium omnis vitae as the object of marriage consent was historically given little canonical precision.<sup>36</sup> Instead, the legal

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<sup>36</sup> It would seem that U. Navarrete is largely correct when he says that while throughout canonical tradition marriage was defined as a consortium totius vitae, this consortium was viewed neither by doctrine nor by jurisprudence as being an essential right which is independent of the sum of essential rights contained within the scheme of the three bona matrimonii, and that it is sufficiently encompassed within canon 1086 #2. What might be added to Navarrete's assertion, though, is the observation that throughout canonical tradition jurists (and theologians too) have frequently recognized a central element of marriage - which can be described by consortium totius vitae - which, though it resisted juridical formulation in the authors' opinions, was really not contained within the scheme of the three bona and which is present in canon 1086 #2 only in the expression "matrimonium ipsum" (not further defined). It is

authors gave most of their attention, when it came to practical solutions for cases directly involving the object of consent, to the potestas in carnalem copulam and the related question of the willingness to conceive and bear offspring.<sup>37</sup>

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36 (cont'd) not described by the ius ad coniugalem actum nor by the essentialis matrimonii proprietates of that canon (since essentialis proprietates is earlier explained in canon 1013 #2 to be simply unity and indissolubility). See U. Navarrete, "Schema iuris recogniti 'De matrimonio'. Textus et observationes", in Periodica, 63(1974), p. 639.

37 The place of the copula in the canon law of marriage is certainly a large one. A. Esmein (Le mariage en droit canonique, Vol. 1, p. 89) remarks: "Le droit canonique assigne aux rapports sexuels, à la copula carnalis, une importance particulière: aucune autre législation, je le crois, n'est entrée aussi loin dans cette voie."

The historical reasons for this were several. At least since Hincmar of Rheims in the ninth century the theory that sexual relations are constitutive of marriage enjoyed great favor, especially among the canonists. And this view was not without foundation in the Fathers, nor for that matter in Scripture. Even when, in the late twelfth and early thirteenth centuries, the consensus theory of marriage finally prevailed, emphasis on the copula remained. Rooted not only in tradition, but also in popular and naturalistic thinking (not totally untrue even today, perhaps), the sexual and procreative aspect of marriage was seen to be the last specification of the conjugal society, distinguishing it from all others. In the law of the Decretals carnal copula became in some cases a juridical indication of matrimonial consent ("presumed marriage"). And although it was the canonists rather than the theologians who were inclined to give the most importance to sexual relations (for practical reasons), even the latter saw a different sacramental symbolism in the unconsummated marriage than in the consummated marriage.

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37 (cont'd) See, among others, A. Esmein, op. cit., Vol. 1, pp. 89-91; G. Le Bras, loc. cit., col. 2149; T. Rincón, El matrimonio, misterio y signo. Siglos IX-XIII, p. 22; G. Oesterlé, "Consentement matrimonial", in D.D.C., Vol. 4, col. 299; G. Leclercq, "De consensu matrimoniali sub aspectu theologico", in Acta conventus internationalis canonistarum Romae diebus 20-25 mai 1968 celebrati, p. 490. For Hincmar of Rheims, see especially "Epistola 22. De nuptiis Stephani et filiae Regimundi comitis", PL 126, 137.

## CHAPTER IV

### THE NATURE OF MARRIAGE IN THE CODE OF CANON LAW

#### 1. The Codex Iuris Canonici.

##### a) Antecedents of the Code.

As has been seen, the common definition of marriage from the thirteenth century onwards was the one found in the Institutes of Justinian: marriage is a "coniunctio" of man and wife, resulting in an "individua consuetudo vitae". Less frequently but occasionally encountered was the definition of Modestinus, describing matrimony as a "consortium omnis vitae". At the same time, by additions to the Roman definition or the substitution of another, the procreative purpose of marriage was often alluded to, sometimes even heavily emphasized. The latter tendency gradually became more pronounced in later centuries, to the point that the potestas in corpora emerged as the dominant, and at times the sole, feature of marriage expressed in its definition. The "individua consuetudo vitae" of the Roman definition, indicating (at least originally) the personal union of the spouses, though still frequently employed, gave way little by little to the idea of the "ius in corpus pro generatione

prolis".<sup>1</sup>

This was particularly evident by the nineteenth century. J.-P. Martin, for example, in his De matrimonio et potestate ipsum dirimendi Ecclesiae soli exclusive propria, published in 1844, says that marriage "in fieri" is "commonly" defined in these or similar terms:

a legitimate contract, whereby a man and woman who are legally capable give to each other the ius in corpora, in ordine ad actus ex se aptos ad generationem prolis, et se obligant ad individuum vitae societatem.<sup>2</sup>

And then he adds:

But in place of this definition, which is otherwise true, another can be substituted, which more correctly expresses the essence and primary property of marriage considered in this way [*i.e., in fieri*]: "A contract whereby a man and woman, legally capable, unite with each other and are joined in a single and undivided principle for the procreation and upbringing of children."<sup>3</sup>

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1 See U. Navarrete, "De iure ad vitae communionem: observationes ad novum Schema canonis 1086 #2", in Periodica, 66(1977), pp. 264-265. Also P. Huizing, "Bonum prolis ut elementum essenziale obiecti formalis consensus matrimonialis", in Gregorianum, 43(1962), pp. 712-713.

2 J.-P. Martin, De matrimonio et potestate ipsum dirimendi Ecclesiae soli exclusive propria, Vol. I, p. I.

3 Ibid., pp. 1-2: "Huic autem definitioni, quae ceteroquin vera est, potest alia substitui, quae rectius praecisam matrimonii eodem modo spectati essentiam proprietatemque primarium exprimit: 'Contractus, quo vir et mulier, iure habiles, sese mutuo consociant et coniunguntur in unum et individuum prolis generandae ac informandae principium.'"

Similarly Martin states that while marriage "in fact" is frequently defined as a "coniunctio maritalis [. . .] individuum vitae consuetudinem retinens", it can be "more clearly" stated that it is a "permanent joining of man and woman in the unity of an undivided principle for the procreation and upbringing of children".<sup>4</sup>

M. Rosset, who published his six-volume De sacramento matrimonii in 1895-1896, discusses various definitions of marriage, saying that the most accurate definition is that which expresses the essence of what is defined. Therefore, he believes, the traditional definition of the Institutes is the best one because

it explains the essence of marriage in fact esse and its chief property, namely the bond whereby man and woman are joined to each other in a single and undivided complete principle for the generation of offspring, while at the same time it explains the indissolubility of this bond.<sup>5</sup>

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<sup>4</sup> Ibid., pp. 8-9: "Matrimonium in fact vulgo definitur: 'Viri et mulieris coniunctio maritalis, inter legitimas personas, individuum vitae consuetudinem retinens.' Cum autem coniunctio maritalis sit ipsamet coniunctio matrimonialis quae definienda est, clarius definiri potest matrimonium sic spectatum: 'Permanens viri et mulieris coniunctio in unitate individui prolis generandae ac informandae principii.'"

<sup>5</sup> M. Rossett, De sacramento matrimonii, Vol. 1, p. 18: "Sane est omnium potissima, quia simul essentiam matrimonii in fact esse et praecipuam eius proprietatem explicat, scilicet nexum quo ad invicem colligantur vir et femina in unum et individuum prolis generandae principium completum, et simul indissolubilitatem huius nexus."

F. Wernz, whose Ius matrimoniale of the four-volume Ius Decretalium was published in 1911-1912, not long before the Code of Canon Law, further exemplified the practice of defining marriage in terms of offspring and the ius in corpus (although he, like others, gave passing recognition to the societal aspect):

If marriage is considered in fieri, it can be defined: The lawful and undivided contract of man and wife for the generation and education of offspring.

If on the other hand marriage is taken as the bond or permanent society, as in common speech and even that proper to theologians and canonists, it is defined: The lawful and undivided union of man and wife for the generation and education of offspring, or more briefly the undivided conjugal or marital society of man and wife.<sup>6</sup>

The canonists of the period immediately preceding the Code of Canon Law seldom treated at any length the question of the ends of marriage as such, except to point out that procreation was the primary end and mutual assistance and the attenuation of concupiscence were

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<sup>6</sup> F. Wernz, Ius matrimoniale, pars 1, pp. 23-24: "Si matrimonium in fieri spectetur, definiri potest: Contractus legitimus et individuus maris atque feminae ad generandam et educandam prolem.

"Vicissim matrimonium, si usu communi et etiam theologis et canonistis proprio, sumatur pro vinculo vel societate permanente, definitur: Coniunctio legitima et individua maris atque feminae ad generandam et educandam prolem, vel brevius: Maris et feminae individua societas coniugalis sive maritalis." Stress in original.

secondary.<sup>7</sup> They frequently, however, dealt with the object of consent or the related question of the essence of marriage. Here also the mutua potestas corporum figured as the chief canonical aspect of marriage. Treating specifically of the essence of matrimony, Rosset, for example, begins in this manner:

As will appear from what is said below, marriage in its causal aspect is a contract whereby the spouses jointly transfer the power over their bodies for carnal copula, in accordance with what is said in I Cor. vii, 4: "The wife has not the power over her body, but her husband. In like manner the husband has not the power over his body, but his wife."<sup>8</sup>

The author then continues at some length on the subject. He distinguishes three elements: the right to copula; the copula itself; and the conjugal society. Neither the marital society nor conjugal sexual relations constitute the object

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7 For instance F. Wernz, ibid., pars 1, p. 37.

8 M. Rosset, op. cit., Vol. 1, pp. 68-69: "Sicut collucebit in infra dicendis, matrimonium causaliter sumptum est contractus quo coniuges sibi mutuo tradunt potestatem corporis in ordine ad copulam carnalem, iuxta illud, I Cor. vii, 4 'Mulier sui corporis potestatem non habet, sed vir. Similiter autem et vir sui corporis, non habet, sed mulier.'" potestatem

of consent, he states, but the ius ad copulam.<sup>9</sup>

Of particular interest, perhaps, for understanding the canonical thought which prepared for the formulations in the Code of Canon Law of the nature of marriage is the teaching of Cardinal Gasparri. He was not only chiefly responsible for overseeing the preparation of the Code, but also wrote extensively on marriage legislation prior to the

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<sup>9</sup> The identification of the juridical object of consent with the ius in corpus seems to have been the common canonical teaching of the immediate pre-Code period. F. Wernz, for instance, defending the notion of marriage as a contract, says: "At matrimonium apud omnes gentes celebratur per verum legitimumque consensum viri et feminae iure habilium, quo sibi verum et mutuam tradunt ius in corpora in ordine ad generandam et educandam prolem." Op. cit., pars 1, p. 42.

This tendency to equate the right to sexual intercourse with the essence of marriage and the object of consent was in evidence, of course, before the nineteenth century. For example, F. Schmalzgrueber, who published his Ius ecclesiasticum universum in 1717, and who had a rather wide outlook on matrimonial questions (being sympathetic, for instance, toward the opinion of Sanchez that cohabitation is generally essential for a valid marriage), appeared to concentrate on carnal copula when it came to determining the essence of matrimony:

"Quaeritur [...] in quo consistat essentia matrimonii? Resp. In matrimonio sex diversa inveniuntur: 1. mutuus consensus; 2. traditio corporum mutua; 3. vinculum quoddam ex hoc consensu, et traditione ortum; 4. obligatio mutua ad reddendum debitum, quae nascitur ex isto vinculo; 5. ius reciprocum ad hoc petendum, quod surgit ex obligatione hac; 6. denique usus, et consummatio matrimonii" (tom. 4, pars 1, tit. 1, n. 256).

It can be noted that of the six elements which comprise the essence of matrimony four refer directly to copula, the other two being consent and the "bond".

publication of the Code. And his treatment of the questions considered here was among the most thorough and explicit of his time.

Gasparri published his first complete treatise on marriage in 1891, entitled Tractatus canonicus de matrimonio. His definition of marriage is the traditional romano-canonical one:

Marriage in general is defined in cap. 11, De praesumptionibus; maris et feminae coniunctio individuum vitae consuetudinem retinens. More clearly marriage can, and should be, considered as in fieri and in facto esse. Marriage in fieri is the lawful contract between man and wife bringing about an individua vitae consuetudo. Marriage in facto esse is the resulting vitae consuetudo, namely the matrimonial bond.

He then describes in more detail what "individuum vitae consuetudo" means:

Individuum vitae consuetudinem afferens, that is, not temporary, but perpetual and of itself to last until death. Vitae consuetudo points out first of all the mutual right, together with the correlative obligation, to the body of the other for the generation and education of offspring, or as they say, the right to sexual relations. Then secondly it means the communion of bed, board, and habitation in a union of wills through mutual love and in a certain union of possessions. [...] That mutual right, together with the correlative obligation to the other's body, is called the bond or the ligamen matrimoniale.<sup>10</sup>

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<sup>10</sup> P. Gasparri, Tractatus canonicus de matrimonio, Vol. 1, pp. 117-119: "Matrimonium in genere definitur cap. 11, De praesumptionibus; maris et feminae coniunctio individuum consuetudinem retinens. Clarius matrimonium spectari potest et debet ut in fieri et ut in facto esse."

And so, while the phrase individua vitae consuetudo of the traditional definition is used here, it is given a double meaning which, while not etymologically exact, is canonically precise: it means, first, the right and obligation to carnal copula, and secondly, living together "in a union of wills through mutual love and in a certain union of possessions". The "first" meaning, then, is simply the right to marital intercourse in view of offspring, while the "second" meaning of the expression clearly points to the conjugal society of the spouses.

What is the juridical significance of the two meanings, or aspects, of individua vitae consuetudo? Gasparri deals with this when he treats of the object of consent. To be distinguished, he says, are (1) the material object of matrimonial consent; (2) the formal object; and (3) the formal essential object. The material object of consent is the

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10 (cont'd) Matrimonium in fieri est contractus legitimus inter marem et feminam individua vitae consuetudinem afferens. Matrimonium in facto esse est inde resultans vitae consuetudo, et nominatim vinculum matrimoniale. [...]

"Individua vitae consuetudinem afferens, idest non temporaneam sed perpetuam per se duraturam usque ad mortem. Vitae consuetudo significat tum in primis ius mutuum cum relativa obligatione in corpus alterius in ordine ad prolem generandam et educandam, seu ius coeundi, uti dicunt; tum deinde communionem tori, mensae et habitationis in unione animorum per mutuum amorem et aliqualem unione bonorum. [...] Illud ius mutuum cum relativa obligatione in corpus alterius appellatur vinculum seu ligamen matrimoniale."

persons themselves, the spouses; the formal object is the "vitae consuetudo"; the formal essential object is the vinculum, or in other words the "mutual right and correlative obligation to the other's body for the procreation and education of offspring". It is only, however, this last element, the right to the body, which is essential in marriage consent. The "communion of bed, board, and habitation" belongs to the "integrity", not to the essence, of the matrimonial contract. The reason, says Gasparri, is that marriages of conscience are sometimes permitted, that is, marriages which are unknown to others, wherein the spouses live apart from each other although they have access to each other, remoto scandalo. And what Gasparri has called the unio animorum et bonorum is not an object of consent at all, but rather a necessary condition for marital happiness.<sup>11</sup>

Thus Gasparri's position is concise and clear. The juridical object of matrimonial consent is the mutual ius in corpus pro generatione. The other dimension of "consuetudo vitae", namely the common life, union of wills, and mutual love of the spouses, are canonically non-essential. In other words, individua consuetudo vitae is indeed a broad concept which includes the various physical, emotional, and spiritual

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<sup>11</sup> Ibid., Vol. 1, pp. 119-120. Also Vol. 2, pp. 2-3, 120-121, 218.

aspects of the conjugal society; but of these aspects only the right to carnal copula for procreation has canonical relevance. Gasparri repeats this when he identifies the essence of marriage in fieri as consent to the ius mutuum in corpus and the essence of marriage in facto esse as the "consuetudo vitae" under the aspect of the right to carnal copula.<sup>12</sup>

Finally, Gasparri treats also the question whether the permanent exclusion of cohabitation in the giving of marriage consent is invalidating. Despite the contrary belief of some (he mentions specifically Sanchez and Schmalzgrueber), his opinion is that such a condition does not nullify the contract, as long as the ius in corpus is left intact. His reasons are, first, his earlier-stated position that the communion of habitation, board, and bed does not belong to the substance of marriage, and secondly, the phenomenon of marriages of conscience.<sup>13</sup>

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<sup>12</sup> Ibid., Vol. 1, pp. 120-121.

<sup>13</sup> Ibid., Vol. 2, p. 79. C. Lefebvre, "De bonorum matrimonii exclusione secundum Card. Gasparri opera", in Apollinaris, 33(1960), pp. 150-151, 155, says that in his Lithographed Commentarium in I, IV, V libros Decretalium of 1884 Gasparri held the opinion that a condition never to cohabit was against the substance of marriage and was invalidating. He changed this position, obviously, in his later work.

Cardinal Gasparri's teaching on the nature of canonical marriage is in all likelihood of some help in understanding the Code of Canon Law, in the composition of which he played a major role. And he would have a considerable influence on the major commentators of the Code, as will be seen.<sup>14</sup> As is evidenced in his writing, he was well aware of the societal and personal dimension of marriage and of the traditional terminology by which these notions were expressed. But his position was that it was only the right to the conjugal act, ordered to procreation, which was canonically essential. The "conjugal society" itself, identified by the classical theologians as the true object of matrimonial consent, became, in his analysis of the canonical substance of marriage, part of its "integrity" or attached to it as a condition for happiness; from a strictly juridical viewpoint, though, it was irrelevant.

b) The Formulations of the Code.

The two canons of the Code of Canon Law which most accurately describe the juridical nature of marriage are probably canon 1013 #1, which lists the primary and secondary ends of marriage, and canon 1081 #2, which identifies the

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<sup>14</sup> F. Wernz (pre-Code) also followed Gasparri very closely in his treatment of the object of matrimonial consent: op. cit., pars 1, pp. 42-43, 72.

object of consent.

can. 1013 #1: Matrimonii finis primarius est procreatio atque educatio prolis; secundarius mutuum adiutorium et remedium concupiscentiae.

can. 1081 #2: Consensus matrimonialis est actus voluntatis quo utraque pars tradit et acceptat ius in corpus, perpetuum et exclusivum, in ordine ad actus per se aptos ad prolis generationem.

To these canons might be added two others which complement and illustrate them, canon 1082 #1, in which is described the knowledge to be possessed by the contractant (the object of the intellectual act), and canon 1086 #2, specifying which exclusions from matrimonial consent are invalidating.

can. 1082 #1: Ut matrimonialis consensus haberi possit, necesse est ut contrahentes saltem non ignorent matrimonium esse societatem permanentem inter virum et mulierem ad filios procreandos.

can. 1086 #2: At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum, aut omne ius ad coniugalem actum, vel essentialem aliquam matrimonii proprietatem, invalide contrahit.<sup>15</sup>

The element which is common and dominant in all four of these formulations is procreation and the right to its physical prerequisite, acts which are suitable for generation.

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<sup>15</sup> The "essential properties" of marriage are unity and indissolubility, as stated in the second paragraph of canon 1013.

Note that there is no explicit definition of marriage in the Code of Canon Law, though one could be constructed from the four canons cited here.

It seems fair to say that in the Code of Canon Law the juridical essence of marriage is therefore the right to carnal copula which is ordered to procreation. This right has the qualities of permanence and exclusivity, as succinctly stated in canon 1081 #2, the canon which stipulates the object of consent and which likewise is the Code's most concise statement of the canonical nature of marriage. Canon 1013 #1, stating that procreation and education are together the finis primarius, is a parallel declaration to canon 1081 #2 and partially explains it, although it is not identical; rather it looks at the same object from a different viewpoint and within a different schema. Together these two legal statements determine what essentially specifies marriage, distinguishing it from all other societies; and they determine the essential formal object of matrimonial consent.<sup>16</sup>

Not without interest are the fontes for the above canons, the sources which are cited in the footnotes to the Code (these notes being the work of Cardinal Gasparri). U. Navarrete has investigated and accurately summarized the fontes of canon 1013 #1. As he reports, they contain little about the ends of marriage as such, and practically nothing

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<sup>16</sup> See U. Navarrete, "Structura iuridica matrimonii secundum Concilium Vaticanum II", in Periodica, 56(1967), pp. 368-369.

about the hierarchical ordering of the ends and their relationship to one another. Navarrete concludes that the Code is the first document of the Magisterium to name and hierarchically order the fines matrimonii in the manner of canon 1013 #1, and the first to use the terminology "primary"- "secondary".<sup>17</sup>

An examination of the sources of canon 1081 #2 produces similar results. Of the eight fontes adduced, six make no mention of the copula or the ius in corpus as the object of matrimonial consent. The other two sources (the first and third in the footnote), both from Gratian - c. 3, C. 27, q. 2; and C. 29, q. 1 - deal respectively with the marriage of the Blessed Virgin and with the Old Testament union of Jacob and Leah. Carnal copula does indeed figure in these two passages, but in a nuanced way. In the canon dealing with the Blessed Virgin, Gratian puts forward the opinion that she did indeed consent to the copula when she consented to marriage, not desiring sexual relations, but obeying divine inspiration. Still, she entered true marriage not simply because she did not exclude the possibility of

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<sup>17</sup> Ibid., pp. 366-368. Navarrete says also (p. 366) that the 1913 preliminary schema of the Code formulated canon 1013 #1 in this way: "Matrimonium finis non modo est procreatio atque educatio prolis, sed mutuum quoque adiutorium et remedium concupiscentiae."

copula, but also because she gave "consensus cohabitandi et individuum vitae consuetudinem retinendi". And in the second passage, which discusses Jacob and Leah in the context of error personae, Gratian purposely distinguishes copula carnalis from marriage. It is consent to individua consuetudo vitae that separates fornication and marital relations. Thus, while both these sources present copula as part of marriage, they do not identify the two nor attempt to specify the right to sexual relations as the sole object of consent.<sup>18</sup> And a reading of the fontes for canons 1082

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<sup>18</sup> Both passages have been briefly commented upon above, pp. 78-79. The central argument of C. 29, q. 1 is quoted on p. 79, note 5. C. 3, C. 27, q. 2 is as follows:

"Beata Maria proposuit se conservaturam votum virginitatis in corde, sed ipsum votum virginitatis non expressit ore. Subiecit se divinae dispositioni, dum proposuit se perseveraturam virginem, nisi Deus ei aliter revelaret. Committens ergo virginitatem suam divinae dispositioni consensit in carnalem copulam, non illam appetendo, sed divinae inspirationi in utroque obediendo. Postea vero filium genuit quod corde conceperat simul cum viro labiis expressit, et uterque in virginitate permansit. #1. Consensus ergo cohabitandi et individuum vitae consuetudinem retinendi interveniens eos coniuges facit. Individua vero consuetudo est talem se in omnibus exhibere viro, qualis ipsa sibi est, et e converso. Ad individuum itaque consuetudinem pertinet absque consensu legitimi viri orationi aliquando non posse vacare, nec continentiam profiteri. Quia ergo iste consensus fuit inter istos, patet hos coniuges fuisse."

The other sources given for canon 1081 #2 are the following:

- a) c. 51, C. 27, q. 2, which treats of the distinction between fides pactionis and fides consensus;
- b) c. 1, X, lib. IV, tit. 4, which is substantially the same as above, "a";

and 1086 #2 likewise shows no source which presents the juridical essence of marriage as the ius in corpus for procreation or which identifies the object of consent in similar terms.<sup>19</sup>

The Code of Canon Law, in stating that matrimonial consent is directed simply to conjugal acts suitable for procreation and in identifying (though in less explicit terms) the canonical essence of marriage with its generative

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18(cont'd) c) the Constitution "Magnum in Christo" of Pope Urban VIII, June 20, 1637, in which it is stated that consent engenders an indissoluble union; also, sanctions can be applied to those who enter second marriages;

d) a response of the Holy Office of July 22, 1840, on the intentions of contracting parties who use a non-Catholic formula which is contrary to the perpetuity of marriage;

e) a response of the Holy Office of August 19, 1857, on intentions against indissolubility and the intention to enter true marriage contrasted with the intention to live in concubinage; there is nothing on the ius in corpus;

f) an Instruction of the Congregation of the Propagation of the Faith, October 1, 1785, dealing with questions arising when Catholic Armenians marry before Turkish judges; again, nothing on the ius in corpus.

<sup>19</sup> Only one source is given for canon 1082, and it does not deal with the ius in corpus. In the case of canon 1086 #2 there are 27 fontes cited. Of these 15 refer entirely or primarily to conditions against the permanency of marriage; 7, to simulation in general; and 4, to various other marriage questions. Only one has a reference to the distinction between the right and the use of the right to copula; but this is not developed; the case is rather one of total simulation (S.C.S. Off., Pisana, 29 aug. 1868). In none of the 27 sources is the ius in corpus identified as the object of matrimonial consent.

dimension, gave the law of marriage a legal trimness and precision which it may have lacked in earlier times (although the legal authors of the years preceding the Code had already begun the process). In doing so, however, the Code inevitably contributed to a certain narrowing of the notion of what marriage is and what constitutes it. The "conjugal society" - which the theologians of the thirteenth century saw to be the essence of marriage and the object of matrimonial consent - became in the formulations of the Code the right to physical acts.

There were vestiges, of course, of the older and wider notions. Canon 1082 mentions a societas permanens, although the context is mainly that of procreation. The term vita coniugalis appears, for example in canons 1111 and 1115, but without canonical import. The expressions communio vitae, consortium vitae, and consuetudo vitae are employed (canons 1129, 1130, and 1131); but they refer to little more than cohabitation (and perhaps sexual intercourse). In general the spare legal language and the juridical formulations of the Code of Canon Law leave little room for

considering marriage to be a consortium omnis vitae.<sup>20</sup>

2. The Influence of the Codex Iuris Canonici.

a) Interpretation of the Code.

The major commentators of the matrimonial law of the Code almost unanimously understood its formulation of the object of consent - as well as the related questions of the relevance of cohabitation, of the distinction between what was of the "essence" and what was of the "integrity" of marriage, and of the canonical import of "consuetudo vitae" - in the manner in which Cardinal Gasparri had explained the same questions in his Tractatus canonicus de matrimonio of

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20 U. Navarrete writes: "This short review [of pre-Code authors] suffices to demonstrate that that element expressed by the term "communio vitae" or another equivalent is surely rooted in canonical and theological tradition. It must be certainly admitted, though, that in recent times, especially from the promulgation of the Code of Canon Law, it has been less acknowledged than it should be.

"Unless we are badly mistaken, in the historical process of the evolution of doctrine and of the conceptual schemes by which the doctrine is expressed, the more the scheme of the ends [of marriage] has been evolved and elaborated over the centuries [..], the more noticeable has been the tendency to define marriage from its primary end - the power over the body for acts suitable for the procreation of offspring - and less attention has been paid than should be to the element of "communio vitae", which has been identified as, or at least placed in relation to, "mutuum adiutorium" and considered as a secondary end." "De iure ad vitae communionem: observationes ad novum Schema canonis 1086 #2", in Periodica, 66(1977), pp. 265-266.

1891.<sup>21</sup> Many authors gave the matters only brief commentary, itself an indication of the strength of the positions witnessed to and elaborated by Gasparri.<sup>22</sup> And when a broader, or "personal-societal", dimension of marriage was mentioned (infrequently as this happened), it was made clear that this enjoyed minimal canonical significance, as when Vermeersch-Creusen described marriage in facto esse:

Marriage in facto esse is the conjugal society or the coniunctio individua of man and woman, of itself perpetual, arising out of the matrimonial contract, consisting of the obligations and rights which are required by the primary and secondary ends of marriage.

This union cannot be complete, or even worthy of human beings, without mutual love and a certain community of goods. The obligation

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21 Gasparri's 1891 text was followed by editions appearing in 1900 and 1904. In 1932 he published a post-Code edition of his work, Tractatus canonicus de matrimonio. Editio nova ad mentem Codicis I.C. His treatment of the questions considered here was practically identical to that of the 1891 text and was frequently cited by other commentators.

22 For instance, A. Vermeersch - J. Creusen, Epitome iuris canonici, tom. 2, ed. 5<sup>a</sup>, 1934, p. 189; G. Payen, De matrimonio in missionibus ac potissimum in Sinis tractatus practicus et casus, 1935-1936, pp. 56-57; M. Conte a Coronata, Institutiones Iuris Canonici, De sacramentis III, 1946, pp. 576-577; F. Wernz - P. Vidal, Ius matrimoniale, 1946, pp. 18-19, 43-44; J. Bánk, Connubia canonica, 1959, pp. 329-330; E. Regatillo, Ius sacramentarium, ed. 4<sup>a</sup>, 1964, pp. 782-783.

L. Bender, who edited the 4th edition (1950) of T. Vlaming, Praelectiones iuris matrimonii ad normam C.I.C., seems to take a little distance from the ius in corpus as adequately expressive of the object of consent (p. 8); but his reservations, if in fact he has any, are only hinted at.

of this love and community, therefore, arises from the contract itself, although it is not its object. For cohabitation perfects the community of life, that is, it pertains to its integrity.<sup>23</sup>

One of the most complete commentaries on the questions of the object of consent and the societal aspect of canonical marriage was that of F. Cappello, who, as can be seen, added little to Gasparri's earlier treatment:

Marriage, viewed as a contract, has a proper and determined object which is either material or formal. The material object is the contracting persons themselves; the formal object, that is, the aspect under which the parties' conjugal union is examined and dealt with, is the individua vitae consuetudo.

This vitae consuetudo consists essentially in the mutual right and obligation toward the other's body with a view to the procreation of offspring.  
[...]

Is the communion of bed, board, and habitation an essential object of the matrimonial contract? There have been authors who taught this, but surely incorrectly. This communion belongs only to the integrity of the marriage contract, that is, to the perfection of the conjugal life; for in fact it is sometimes missing, and this with the

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<sup>23</sup> Vermeersch-Creusen, op. cit., pp. 189-190:  
"Matrimonium in facto esse, est societas coniugalis seu coniunctio individua et per se perpetua viri et mulieris, orta ex contractu matrimoniali, constans obligationibus et iuribus quae requirit finis primarius et secundarius matrimonii.

"Quae unio sine mutuo amore et quadam bonorum communitate nec perfecta, immo nec hominibus digna esse potest; illius ergo amoris et communicationis obligatio ex ipso contractu, cuius tamen obiectum non sunt, oritur. Cohabitatio vero ipsam vitae coniunctionem perficit seu ad eius integritatem pertinet."

permission of ecclesiastical authority, as for example in marriages of conscience, or in the case of spouses who have obtained a lawful separation.<sup>24</sup>

Cappello later, in his commentary on canon 1128 ("spouses are obliged to maintain a communion of conjugal life, unless a just cause excuses them"), makes it clear that this triple "communion" of bed, board, and habitation is what is meant by individua vitae consuetudo in its full sense (adaequata sumpta). It is the same as vitae coniugalis communio, and he again explains that it "does not belong to the essence of marriage, but only to its integrity".<sup>25</sup>

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24 F. Cappello, Tractatus canonico-moralis de sacramentis, Vol. 3, De matrimonio, ed. 4<sup>a</sup>, 1939, pars 1, p. 6: "Matrimonium, utpote contractus, proprium ac determinatum habet obiectum sive materiale sive formale. Obiectum materiale sunt ipsae personae contrahentium; obiectum formale i.e. ratio sub qua consideratur et attingitur earum unio coniugalis, est 'individua vitae consuetudo'.

"Haec vitae consuetudo essentialiter consistit in iure et officio mutuo in corpus alterius in ordine ad prolis generationem. [...]"

"Communio thori, mensae et cohabitationis estne obiectum essentialiter contractus matrimonialis?"

"Non defuerunt DD. qui id docuerint; at immerito prorsus. Praefata communio solum ad integritatem seu ad perfectam vitam coniugalem spectat, non autem ad essentiam matrimonialis contractus, cum re ipsa aliquando desit, ecclesiastica auctoritate permittente, ex. gr. in matrimoniis conscientiae aut in coniugum separatione legitime inducta."

See also pars 1, p. 7; and pars 2, p. 6 of the 4th edition. In the 7th edition of his work (1961) Cappello drops all reference to the "vitae consuetudo" as the object of consent, saying simply that the formal object is the "ius mutuum in corpus, perpetuum et exclusivum, cum relativa obligatione, in ordine ad actus per se aptos ad prolis generationem". See Tractatus canonico-moralis de sacramentis, Vol. 5, De matrimonio, ed. 7<sup>a</sup>, 1961, p. 5.

25 Cappello, op. cit., ed. 4<sup>a</sup>, pars 2, p. 342; ed. 7<sup>a</sup>, p. 757.

With the fewest of exceptions, the commentators of the Code did not believe that the intention or condition of never cohabiting would invalidate the matrimonial contract.<sup>26</sup> The reasons brought forward for this opinion were usually the two previously advanced by Gasparri, that is, the permissibility of marriages of conscience, and the position that cohabitation was not of the essence of marriage, but only part of its "integrity". The jurisprudence of the Rota generally followed this position also.<sup>27</sup>

b) Reaffirmations of the Code.

i - Casti Connubii, December 31, 1930:- The Encyclical Letter of Pope Pius XI on Christian marriage, Casti Connubii, although not primarily a legislative document, touched upon several canonical questions. First,

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<sup>26</sup> See, for instance, P. Huizing, "Bonum proles ut elementum essenziale obiecti formalis consensus matrimonialis", in Gregorianum, 43(1962), p. 721, who says that G. Oesterlé, however, "paululum extra chorum cantare videtur". Oesterlé's contrary opinion is expressed in "Consentement matrimonial", in D.D.C., Vol. 4, col. 299: "The common bed, the common table, as well as cohabitation, are not the essential object of marriage, but only an integrating part of the contract. Nevertheless the positive exclusion of this community would be contrary to the very essence of marriage."

<sup>27</sup> See, besides P. Huizing, loc. cit., L. Wrenn, "Marriage and Cohabitation", in The Jurist, 27(1967), pp. 85-89. While acknowledging that Gasparri's opinion "has now been widely adopted in Rotal decisions", Wrenn cites several decisions which hold that the intention never to cohabit is often a sufficient indication of vitiated consent.

it rather clearly reaffirmed the teaching of the primacy of the procreative aspect of marriage. Speaking within the context of the Augustinian bona matrimonii, the Pope declares:

Thus amongst the blessings (bona) of marriage, the child holds the first place. And indeed the Creator of the human race Himself, Who in His goodness wished to use men as His helpers in the propagation of life, taught this when, instituting marriage in Paradise, He said to our first parents, and through them to all future spouses: "Increase and multiply, and fill the earth." As St. Augustine admirably deduces from the words of the holy Apostle Saint Paul to Timothy when he says: "The Apostle himself is therefore a witness that marriage is for the sake of generation: 'I wish,' he says, 'young girls to marry.' And, as if someone said to him, 'Why?' he immediately adds: 'To bear children, to be mothers of families.'"<sup>28</sup>

Shortly afterwards, still speaking of procreation, the pope refers to canon 1013 of the Code:

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<sup>28</sup> Pius XI, Casti Connubii, in A.A.S., 22(1930), pp. 543-544: "Itaque primum inter matrimonii bona locum tenet PROLES. Et sane ipse humani generis Creator, qui pro sua benignitate hominibus in vita propaganda administris uti voluit, id docuit cum in paradiso, matrimonium instituens, protoparentibus et per eos omnibus futuris coniugibus dixit: 'Crescite et multiplicamini et replete terram.' Quod ipsum Sanctus Augustinus ex Sancti Pauli Apostoli verbis ad Timotheum perbelle eruit, dicens: 'Generationis itaque causa fieri nuptias, Apostolus ita testis est: Volo, inquit, iuniores nubere. Et quasi ei diceretur: Utquid?, continuo subiecit: Filios procreare, matresfamilias esse.'" For this encyclical the English translation by the National Catholic Welfare Conference, 1931, is used.

The blessing of offspring, however, is not completed by the mere begetting of them, but something else must be added, namely the proper education of the offspring. [...]

Since, however, we have spoken fully elsewhere on the Christian education of youth, let us sum it all up by quoting once more the words of St. Augustine: "As regards the offspring it is provided that they should be begotten lovingly and educated religiously," - and this is also expressed succinctly in the Code of Canon Law - "The primary end of marriage is the procreation and education of children."<sup>29</sup>

It is true that the bonum fidei receives considerable development in the encyclical, being described in terms of the bonum coniugum, the sum of personal (and spiritual) benefits of marriage.<sup>30</sup> It is not suggested, however, that this elaboration of the bonum fidei involves an expansion of its canonical significance. There is another mention, though a brief one, in Casti Connubii of the finality of marriage, this time of the "secondary ends":

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<sup>29</sup> Ibid., pp. 545-546: "Procreationis autem beneficio bonum prolis haud sane absolvitur, sed alterum accedat oportet, quod debita prolis educatione continetur. [...]"

"Cum autem de christiana iuventutis educatione alias copiose egerimus, haec omnia nunc iteratis Sancti Augustini verbis complectamur: 'In prole [attenditur (sic)], ut amanter suscipiatur..., religiose educetur,' quod quidem in Codice iuris canonici nervose edicitur: 'Matrimonium finis primarius est procreatio atque educatio prolis.'"

<sup>30</sup> See above, pp. 35-37.

For in matrimony as well as in the use of the matrimonial rights there are also secondary ends, such as mutual aid, the cultivating of mutual love, and the quieting of concupiscence which husband and wife are not forbidden to consider so long as they are subordinated to the primary end and so long as the intrinsic nature of the act is preserved.<sup>31</sup>

The context of the passage, which is the morality of sexual intercourse at a time when it is known that pregnancy will not ensue, itself indicates that this is not a "canonical" statement either, although it may be of interest to observe that "mutual love" is here placed among the secondary ends of marriage.<sup>32</sup>

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31 A.A.S., 22(1930), p. 561: "Habentur enim tam in ipso matrimonio quam in coniugalis iuris usu etiam secundarii fines, ut sunt mutuuum adiutorium mutuusque fovendus amor et concupiscentiae sedatio, quos intendere coniuges minime vetantur, dummodo salva semper sit intrinseca illius actus natura ideoque eius ad primum finem debita ordinatio."

32 U. Navarrete, "Structura iuridica matrimonii secundum Concilium Vaticanum II", in Periodica, 57(1968), p. 194, remarks that there is no attempt here to give a taxative enumeration of the secondary ends. He also asserts that this encyclical is the only document of the Magisterium to explicitly call conjugal love an end of marriage.

For the sake of accuracy it might also be pointed out that the translation followed here is not exactly correct in its expression that the secondary ends must be "subordinated" to the primary end. In the Latin original it is the conjugal act rather than the secondary ends which are to be "ordered" (ordinatio) to the primary end. In the NCWC translation the text appears to say more than canon 1013, but this is not actually the case.

ii - The Rotal Decision coram Wynen, January 22, 1944:- Canon 1013 #1, while indicating a hierarchy of the ends of marriage, did not give a further specification of what the hierarchy consists of, nor of its juridical import. All that is stated is that procreation and education are "primary" and that mutual aid and the remedy for concupiscence are "secondary", that is, that one end possesses a certain priority with respect to the other. It can be deduced from other canons, however, particularly 1081 #2 (the object of consent), 1082 #1 (requisite knowledge), and 1086 #2 (invalidating intentions), that the primary end is the "controlling" element of canonical marriage and thus to a great extent determines the juridical relevance of the secondary ends. But a more complete specification of the relation of the ends to one another (and, in the case of the secondary ends, to marriage itself) would have to await subsequent elaboration from other sources, especially jurisprudence and, as it happened, from the Magisterium itself.<sup>33</sup>

What was probably the most complete explanation of this question was given in a celebrated Rotal decision coram Wynen, January 22, 1944. The decision was published in its

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<sup>33</sup> See U. Navarrete, "Structura iuridica matrimonii secundum Concilium Vaticanum II, in Periodica, 56(1967), pp. 368-369.

entirety that same year in the Acta Apostolicae Sedis, an unusual occurrence.<sup>34</sup> The case involved a "marriage of honor", in which the parties never lived together, though the union perdured for ten years. The woman, Defendant in the case, had prior to marriage (but not prior to the couple's romantic involvement) been diagnosed as suffering from a contagious and incurable disease. When the woman's condition became known, the man was urged to marry her; but he refused and fled to another city. Eventually persuaded to enter marriage, however (a child having been conceived out of wedlock), he did so. Later he introduced the suit for nullity, initially alleging two grounds, force-fear and simulation of consent.

The case was heard in the Rota in Second Instance on the grounds of simulation of consent alone. The decision was negative, non constat, although the allegation that the parties never lived together was not challenged. Instead it was judged that the couple's decision not to cohabit was a mutual one and that the ius in corpus had not been denied, although the man had never intended to implement it. The judges did recommend that the Holy Father grant a dispensation super rato, and this was given shortly afterwards. The major

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<sup>34</sup> A.A.S., 36(1944), pp. 179-200. The decision was in due course published also in S.R.R. Dec., 36(1944), pp. 55-79.

part of the in iure section of the Rotal decision dealt with the ends of marriage, inasmuch as the question of simulation revolved about the intention not to live a common life.

The decision takes notice of mention of the ends of marriage in the Roman Catechism, the encyclical Casti Connubii, canon 1013 §1 of the Code, and an address of Pope Pius XII to the Rota on October 3, 1941.<sup>35</sup> Citing St. Thomas, it asserts that marriage can have only one finis operis which is "first" and "principal" and which functions as formal cause, to which all other ends are ordered. This finis principalis, then, "determines the specific nature of marriage", and to it all other ends are subordinated. Evidently, it is the procreation and education of offspring which is the first and principal end; and thus it is to procreation-education that marriage, of its very nature, is objectively ordered.<sup>36</sup>

The sentence next addresses itself to the secondary ends, particularly mutuum adiutorium. Mutual aid includes a number of elements, such as cohabitation, "communio mensae", the use of material goods, the earning and administration of the means of support, a more personal assistance in the

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<sup>35</sup> For the text of Pope Pius XII's address, see below, p. 141.

<sup>36</sup> A.A.S., 36(1944), pp. 184-185.

physical and emotional spheres of life, and even in spiritual matters. Some recent authors, the decision notes, have attempted to make of this "personal element" of marriage its primary purpose.<sup>37</sup>

The central question examined in the Rotal decision is the relationship between the primary and secondary ends of marriage. It is noted, first, that mutual aid and a "totius vitae consortium" between two persons of different sex can be achieved even outside marriage, for instance, between a brother and sister, or intimate friends. This is not, however, the mutual aid and "vitae communio" which is proper to marriage and is its secondary end. To be "marital" this man-woman relationship must have a "special quality", and this quality is to be found in its relationship to the primary end.<sup>38</sup>

The basis of this relationship is seen in the Rotal decision as two-fold. First, the secondary end takes its origin from the primary end, that is, it exists so that the procreation and education of offspring can be accomplished. Furthermore it is more correct to speak here of the right to mutual aid, just as the object of consent is not actually the conjugal act, but the right to it. This ius ad mutuum

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37 Ibid., pp. 187-188.

38 Ibid., p. 188.

adiutorium, which includes, "the right to the vitae consortium, that is, the right to cohabitation, to a communion of board and bed, and to help in all the necessities of life", arises only in view of the primary right, which is generation. The ius in corpus always involves the ius ad vitae consortium; and so whenever there is marriage, there is likewise the right to its secondary end, the "ius ad vitae communionem mutuamque auxilium".<sup>39</sup>

Nevertheless, the ius secundarium is not a constitutive part of the ius principale, nor is it joined to it as a prerequisite conditio sine qua non. For this reason a valid marriage can be entered as long as the principal right is given, "even if the secondary right has been explicitly refused". The Rotal decision supports this statement by pointing to the position of Gasparri and Wernz-Vidal that cohabitation and the communio thori et mensae belong not to the essence, but to the integrity of marriage. Of what juridical value, then, would be the exclusion from consent of the secondary ends? The sentence asserts that a "serious and definite intention" not to concede ever, or in any manner, the "ius ad vitae consortium ac ceterum mutuum adiutorium" can be, like the intention of not implementing the ius in corpus, an "indication" (indicium) of refusal to

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39 Ibid., pp. 188-189.

give the principal right, "although from this indication alone there can never arise moral certitude about the lack of intention to contract and to oblige oneself".<sup>40</sup>

The relation of the secondary to the primary end has now clearly been seen in the Rotal decision to be one of "dependence" and "subordination". A second way of viewing the relationship (the first was from the origin of the finis secundarius) is from a consideration of marriage in facto esse. Mutual assistance and all that it includes cannot be a sufficient justification for marriage. Man is naturally a social being and consequently is involved in a number of associations which entail mutual aid and assistance. But these associations and relationships differ radically from marriage. And so it is evident again that the "specific element" by which marriage is "determined" is its procreative finality, to which mutual assistance is directed. Once more the decision refers to the distinction between the right and the fact of mutuum adiutorium matrimoniale; and once more it is said that a valid marriage can come into existence without the actual "handing over" (traditio) of the right.<sup>41</sup>

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<sup>40</sup> Ibid., pp. 189-190. The decision also cites the definition of marriage of Modestinus, remarking that one cannot draw from this definition conclusions on the principal and secondary constituents of marriage (p. 191).

<sup>41</sup> Ibid., pp. 191-192.

How might this Rotal decision be evaluated in light of the present study? First, it was a splendid summary of what might be called the "traditional" doctrine of the ends of marriage. Furthermore it went beyond previous teaching in distinguishing between the fact of mutuum adiutorium (using this phrase to include all the secondary ends) and the right to it. Thirdly, the decision evidenced an appreciation of the secondary, personal ends of marriage which was difficult to detect in earlier modern authors (the commentators of the Code prior to this decision had for the most part very little to say on the subject). It might be suggested, though, that the major conclusion of the sentence was less than satisfying. After rather profoundly analyzing the secondary end of marriage, and arguing that the right to it (referred to in one passage as a ius ad vitae consortium) is always present whenever a valid marriage is entered, the Ponens was able to assert nevertheless that a true marriage could take place "even if the secondary right has been explicitly refused". The argumentation appears in places to move in a counterdirection to the conclusion.<sup>42</sup>

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<sup>42</sup> The in iure portion of the sentence concludes with a summary, which reads in part:

"1. The destinatio and corresponding right to mutual aid belong to marriage of its nature and by the will of the Creator, and they constitute its secondary finis operis. Therefore they can never be absent from a true and complete

This Rotal decision of January 22, 1944, was not an authoritative interpretation of canon 1013 #1. But it was probably the most thorough commentary it had yet received. A measure of its significance was its prompt appearance in the Acta Apostolicae Sedis, as well as its frequent citation by subsequent authors as a penetrating explanation of the relation between the primary and secondary ends of marriage.<sup>43</sup>

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42 (cont'd) conjugal communion, nor are they ever frustrated (frustra existunt) insofar as there exists marriage itself along with its primary end and principal right. [...]

"4. The secondary end has a certain independence, that is, to the extent that it can be verified and functioning for the spouses even in those cases where the achievement of the primary end is impeded, either temporarily or perpetually. The reason for this is that mutual aid (and likewise the right to it) does not constitute an essential part of the primary right and end. Rather, it is 'outside the essence' of the primary right and end, although it is a natural consequence of it and is truly and properly said to be a matrimonial 'right'." Ibid., pp. 192-193.

Commenting upon the decision, Ford and Kelly remark: "[Wynen] shows so clearly the essential connection between the secondary and primary right in marriage, and the intrinsic subordination of the former to the latter, that one would expect him to draw the easy inference that the secondary right is a constitutive part of the essential marriage bond. But he does not draw that inference." J. Ford - G. Kelly, Contemporary Moral Theology. Volume II: Marriage Questions, p. 89.

43 See, for example, M. Conte a Coronata, De sacramentis, III, pp. 5-6; J. Bánk, Connubia canonica, pp. 21-28; E. Regatillo, Ius sacramentarium, pp. 580-582, 591-592; E. Doronzo, Tractatus Dogmaticus de Matrimonio, pp. 794-796, 802.

iii - The Decree of the Holy Office on the Ends of Marriage, April 1, 1944:- Shortly after the Rotal decision before Wynen was given, but before it appeared in print, there was published a Decree of the Holy Office on the ends of marriage. It was certainly occasioned by the writings of a number of people, the most well-known of whom was undoubtedly H. Doms, who challenged (at least indirectly) the adequacy of the formulation of canon 1013 #1 and who proposed theories whereby the bonum coniugum would be given more important consideration in the scheme of matrimonial finality.<sup>44</sup>

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<sup>44</sup> These authors, generally writing from a viewpoint which was more theological than canonical, have been called, for understandable reasons, "personalists". H. Doms's major work, Vom Sinn und Zweck der Ehe, was first published in 1935. In 1937 a second French edition was published, Du sens et de la fin du mariage; and in 1939 it appeared (minus one chapter) in English as The Meaning of Marriage. Likewise very influential was the work of B. Krempel, Die Zweckfrage der Ehe in neuer Beleuchtung, published in 1941.

The theories of the personalist school inaugurated widespread debate. For a bibliography on the subject see, among others, J. Ford, "Marriage: Its Meaning and Purposes", in Theological Studies, 3(1942), pp. 333-334 (updated in J. Ford and G. Kelly, op. cit., pp. 29-30); and P. Adnès, Le mariage, pp. 119-120. The tendency to raise the "secondary" ends of marriage nearer the level of the "primary" (a "reactionist tendency") had begun to be noticeable even in the nineteenth century. For a listing of theologians and canonists from the mid-nineteenth to the mid-twentieth century whose positions have been viewed in this light, see P. Viladrich, "Amor conyugal y esencia del matrimonio", in Ius canonicum 12, No. 23(1972), pp. 276-277. For a summary of the teachings of Doms and Krempel, see J. Ford and G. Kelly, op. cit., pp. 21-27; and for a sympathetic presentation of Dom's position see also B. Lavaud, "The Interpretation of the Conjugal Act and the Theology of Marriage", in The Thomist, 1(1939), pp. 368-370.

The decree is brief enough to cite almost in its entirety:

In the last few years a number of published writings concerning the ends of marriage and their relation and order have appeared, which assert either that the primary end of marriage is not the generation of children, or that the secondary ends are not subordinate to, but are independent of the primary end.

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44 (cont'd) Because of the various positions and nuances of authors of the "personalist" school, an adequate summary of their teaching is quite difficult to present. One résumé of Doms's theory which gives a good idea of his central thesis, as well as its divergence from the traditional thought, is his own summary, from the English edition of his work:

"To sum up: - the immediate purpose of marriage is the realisation of its meaning, the marital two-in-oneship [Zweieinigkeit]. In the process of this realisation a community of fundamental importance for human society is formed. This intimate community is marriage. As a result of marriage two human beings come to live a life single in everything from religious community to sexual. But the presence of sexual community is what expressly constitutes marital community, for every other community can be realised outside marriage. By marriage we mean the enduring love-relationship of two grown-up persons of different sex, who come together to form one indivisible and indissoluble community of life in which they can fulfill and help each other. The supreme point of intimacy in this community occurs when they become one in the marriage act. This two-in-oneship of husband and wife is to some extent a purpose in itself. But it also acts powerfully on the personalities of husband and wife, though in such a way that the individuality and independence of each is not lost in the union. It is for them a source of health and of sanctity, and becomes for them the door to every natural and supernatural consummation. It tends also to the birth and education of new persons - their children. The child assists their own fulfillment, both as a two-in-oneship and as separate individuals. But society is more interested in the child than in the natural fulfillment of the parents and it is this which gives the child primacy among the natural results of marriage.

In these discussions the primary end of marriage is variously designated; for example, it is said that it consists in the complement and personal perfection of the spouses by a complete communion of life and action; in their mutual love and union, to be advanced and perfected through the psychical and corporal surrender of their persons; and various other things of this sort.

Sometimes in these writings a meaning is attached to words which occur in the teachings of the Church (for example, end, primary, secondary), which is not appropriate to these words according to their common use among theologians.

This new departure in thought and speech is liable to occasion errors and uncertainties; and in order to avert such consequences the Eminent and Most Reverend Fathers of this Supreme Sacred Congregation, which is in charge of safeguarding matters of faith and morals, in the plenary session of Wednesday the 29th of March, 1944, considered the question proposed to it as follows:

Question. Whether the opinion of certain modern writers can be admitted, who either deny that the primary end of marriage is the generation and education of children, or teach that the secondary ends are not essentially subordinate to the primary end, but are equally principal and independent.

Reply. In the negative. [..]45

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44 (cont'd) "Thus we distinguish the meaning [i.e., the community of life, Zweieinigkeit] from the purposes of marriage and maintain that the immediate purpose of the marriage ceremony and of the permanent legal bond is the realisation of this meaning." The Meaning of Marriage, pp. 94-95.

45 A.A.S., 36(1944), p. 103: "[..] 'An admitti possit quorundam recentiorum sententia, qui vel negant finem primum matrimonii esse prolis generationem et educationem, vel docent fines secundarios fini primario non esse essentialiter subordinatos, sed esse aequae principales et independentes'; respondendum decreverunt [Patres S.C.S.O.]: Negative." The English translation is from C.L.D., Vol. 3, pp. 401-402.

The principal points made by the decree are, in line with its brevity, simple and clear. They are, first, that the primary end of marriage is the procreation and education of offspring and nothing else, such as the personal benefits deriving from marriage, the bonum coniugum; secondly, the secondary ends are not "equally principal" ("aeque principales"), but on the contrary are (a) dependent upon and (b) "essentially subordinate" ("essentialiter subordinati") to the primary end. The decree does not spell out precisely what it means to be "dependent" and "essentially subordinate". But it goes beyond the statement of canon 1013 #1 in describing the relation of the secondary to the primary end. The former is definitely not on the same level as the latter; and the decree is certainly compatible with the argumentation of the Rotal decision coram Wynen.<sup>46</sup>

iv - The Teaching of Pope Pius XII:- Despite the fact that Pope Pius XII (1939-1958) never published an encyclical, or even a lengthy document, on marriage, he perhaps spoke formally on the subject more often than any other pope before him, generally in addresses before various

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<sup>46</sup> For a knowledgeable commentary on the decree, see "Annotationes [in S.C.S. Officii Decretum 20 apr. 1944]", in Periodica, 33(1944), pp. 218-228. It is unsigned, but was quite possibly authored by F. Hürth.

groups.<sup>47</sup> On October 3, 1941, he delivered an address to officials of the Roman Rota<sup>48</sup> in which he dealt in part with the ends of marriage:

Frequently also the Rota has dealt with bodily incapacity for marriage. In this matter, which is both delicate and difficult, there are two tendencies to be avoided: first the one which, in examining the constituent elements of the act of generation, considers only the primary end of marriage, as though the secondary end did not exist, or were not the finis operis established by the Creator of nature himself; and secondly the one which gives the secondary end a place of equal principality, detaching it from its essential subordination to the primary end - a view which would lead by logical necessity to deplorable consequences. In other words, the truth is intermediate, and two extremes must be avoided: on the one hand practically to deny or esteem too little the secondary end of marriage and of the act of generation; on the other hand, to dissociate or separate unduly the conjugal act from its primary end, to which according to its entire internal structure it is primarily and principally ordained.<sup>49</sup>

Specially noteworthy in this address is the language describing the relation between the secondary and the primary ends of marriage. The former is denied a place of "equal principality" ("ugualmente principale") and is in a position of "essential subordination" ("essenziale sua subordinazione")

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<sup>47</sup> See T. Makin, "Conjugal Love and the Magisterium", in The Jurist, 36(1976), p. 275.

<sup>48</sup> A.A.S., 33(1941), pp. 421-426.

<sup>49</sup> The translation of the original Italian is from C.L.D., Vol. 2, pp. 455-456..

to the latter. The address of Pope Pius to the Rota was given prior to the Rotal decision coram Wynen and the Decree of the Holy Office. It is clearly the controlling language of both, and almost certainly determined their mode of expression in describing the relationship between the primary and secondary ends of marriage.<sup>50</sup>

The theme of matrimonial finality continued to appear frequently in the Pope's speeches. In an allocution to newlyweds on March 18, 1942, he referred to procreation as the "essential and primary end" of marriage.<sup>51</sup> On March 22 of the same year, also in an address to newlyweds, he spoke of procreation-education, as well as a common family life, as the purposes of marriage.<sup>52</sup> Addressing the Biological-Medical Union of St. Luke, November 11, 1944, he stated that the "primary purpose (to which the secondary ends are essentially subordinated [lo scopo primario...essenzialmente subordinati]) desired by nature [...] is the propagation of life and the bringing up of children".<sup>53</sup> And again on September 18, 1951,

<sup>50</sup> According to U. Navarrete, "Structura iuridica matrimonii...", in Periodica, 56(1967), pp. 369-370, this address was the first Magisterial statement in which the relationship between the ends of marriage was presented in these precise terms.

<sup>51</sup> Discorsi e radiomessaggi di Sua Santità Pio XII, Vol. 4, p. 5.

<sup>52</sup> Ibid., Vol. 4, p. 46.

<sup>53</sup> Ibid., Vol. 6, p. 192.

addressing a group of fathers of French families, he called the procreation and education of children the "primordial end" ("la vraie fin primordiale du mariage").<sup>54</sup>

In one of Pope Pius XII's most significant addresses, that given on October 29, 1951, to the Italian Catholic Union of Midwives, he made the following statement:

Now the truth is that marriage, as a natural institution and by the Creator's will, has as its primary end and intrinsic purpose fine primario e intimo not the personal perfecting of the parties but the procreation and education of new human life. The other ends of marriage, though they too are intended by nature, are not on the same level with the first, still less are they superior; they are essentially subordinate to it non si trovano nello stesso grado del primo...ma sono ad esso essenzialmente subordinati.  
[...]

It was precisely to dispel all the uncertainties and errors which were threatening to spread mistaken ideas about the subordination of ends in marriage, that some years ago (10 March 1944) We Ourselves drew up a statement on the relation existing between those ends; wherein We pointed to the evidence provided by the intrinsic structure of nature's design, appealed to the patrimony of Christian tradition and to the constant teaching of the Popes, and indicated what is duly laid down in the code of canon law (can. 1013, 1). Indeed, shortly afterwards the Holy See corrected contrary views by public decree, declaring inadmissible the opinion of certain recent authors who deny that the primary end of marriage is the procreation and education of offspring, or teach that the secondary ends of marriage are not essentially subordinate to

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<sup>54</sup> A.A.S., 43(1951), p. 733.

its primary end, but equipollent and independent.  
(Decree of the Holy Office, 1 April 1944).<sup>55</sup>

While so strongly reaffirming the subordinate position of the secondary ends, Pope Pius also, in the same address, spoke of the importance of the "personal values" of marriage:

This is by no means to reject or belittle all that is good and right in the personal values deriving from matrimony and its consummation. [...]

To reduce the communal life and man and woman and their marital relations to nothing more than an organic function for transmitting life-germs would be to convert the home, this sanctuary of the family, into a mere biological laboratory. And this is the reason why, in Our address to the international Congress of Catholic doctors on the 29th September, 1949, we formally excluded from marriage the practice of artificial fecundation [A.A.S., 41(1949), pp. 557-561]. The marital act, in its natural structure, is a personal action, a simultaneous and direct co-operation of husband and wife which, because of the very nature of the agents and the distinctive character of the act, is the expression of the mutual self-giving that, in the words of Scripture, makes them "one flesh". [...]

And so, if an affianced bride or a young wife comes to talk to you about the values of married

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<sup>55</sup> The Allocution to Midwives is found in A.A.S., 43(1951), pp. 835-854. The translation from the original Italian is from The Clergy Review, 36(1951), pp. 379-391, and 37(1952), pp. 45-51 (here, Vol. 37, pp. 46-47).

The Pope's statement of March 10, 1944, to which he refers in this allocution does not seem to have ever been published. But it was in all likelihood almost identical in substance to the Decree of the Holy Office, April 1, 1944, which he also cites here. Thus F. Hürth, De re matrimoniali, p. 120.

life, tell her that these personal values, whether they belong to the order of the body and the senses or to that of the spirit, are real indeed and genuine, but that the Creator has set them in the second rank of the scale, not the first.<sup>56</sup>

Pius XII continued to stress the procreative finality of marriage. At the same time he gave frequent recognition to the secondary, personal ends of the matrimonial state, always cautioning against an exaggerated emphasis on one to the detriment of the other.<sup>57</sup> Attempting to evaluate the

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<sup>56</sup> The Clergy Review, 37(1952), pp. 47-48.

<sup>57</sup> In an allocution to members of the "Fronte della Famiglia", November 26, 1951, the Pope referred to previous speeches of his on the subject and repeated that the "primary office (l'ufficio primario) of matrimony is to be at the service of new life". A.A.S., 43(1951), p. 859.

On October 8, 1953, speaking to the 26th Congress of the Italian Society of Urologists, the Pope stated:

"Certainly the good sense of men and the practice of the Church leave no doubt on the fact that personal values are involved in marriage and its consummation; values which surpass by far mere biology and which the spouses often understand much better than the immediately biological ends of nature. But reason and Revelation suggest also and imply that nature introduces this personal and supra-biological element because it calls to marriage not sensitive beings deprived of reason, but men endowed with intelligence, heart and personal dignity, and charges them to procreate and educate new life: because, in marriage, the spouses devote themselves to a permanent task and to a community of life which is indissoluble." - A.A.S., 45(1953), p. 677. The translation from the French of the Acta is from Papal Teachings. Matrimony, pp. 459-460.

In an allocution given to members of the Second World Congress of Fertility and Sterility, May 19, 1956, Pope Pius again attempted to integrate the biological and personal values of marriage:

"Several times it has been necessary for us to recall how the peculiar intentions of the married couple, their life

corpus of his teaching on the question of the ends of marriage, one could correctly assert that Pius XII's most frequently stated, and strongest, concern was for the primacy of the procreative dimension. He continually adverted to this theme; and the terminology he employed - besides going well beyond the formulation of the Code of Canon Law - left no doubt about its role of primacy and absolute superiority for understanding the nature of marriage, including its juridical structure. Pope Pius XII did not neglect the bonum coniugum. It may be argued, in fact, that his statements over the years show a real development in appreciating and presenting this aspect of marriage.

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57 (cont'd) in common, their personal perfection, cannot be conceived unless they are subordinated to the primary end, namely, fatherhood and motherhood. [...] This is the constant teaching of the Church. She has rejected all those concepts of matrimony which threatened to enfold it in itself or to make it an egoistic search for affective and physical satisfaction in the sole interest of husband and wife.

"But the Church has likewise rejected the opposite attitude which pretended to separate, in procreation, the biological activity from the personal relations of husband and wife. The child is the fruit of the marriage union, when it finds full expression by the placing in action of the functional organs, of the sensible emotions thereto related, and of the spiritual and disinterested love which animates such a union; it is in the unity of this human act that there must be considered the biological conditions of procreation. Never is it permitted to separate these different aspects to the point of excluding positively either the intention of procreation or the conjugal relation." A.A.S., 48(1956), pp. 469-470. The translation of the original French is from Papal Teachings. Matrimony, pp. 484-485.

Considering his teaching as a whole, nevertheless, his statements constituted a powerful reaffirmation of the position which saw in the finis primarius the "exclusively determining factor" in canonical marriage, its sole elementum iuridicum specificum. The personal-conjugal dimension, while receiving a more penetrating and profound explanation than perhaps ever before in ecclesiastical history (from Rotal Auditor Arthur Wynen as well as Pope Pius XII), remained in essence devoid of practical juridical value.<sup>58</sup>

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The teaching of Pope Pius XII, despite his concern about a number of aspects of matrimony, can also be seen to be the culmination of a movement, documented in this chapter, away from an awareness of marriage as a "conjugal society"

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<sup>58</sup> It is perhaps more accurate to say that the personal-conjugal aspect of marriage was given juridical value only insofar as the spouses ordinarily possessed the right to receive from each other, and were under a corresponding obligation to extend to each other, some form of mutual aid and concern. The nearest thing to a legal provision for this in the Code is canon 1128: "Spouses are obliged to maintain a communion of conjugal life unless a just cause excuses them." Aside from the fact that in some countries an ecclesiastical judge may have the power to order a couple to live under the same roof, the right-obligation of mutual aid is for practical purposes the simple equivalent of a moral duty. According to the positions described in this chapter, the presence or intentional absence ab initio of the ius ad mutuum adiutorium has of itself no effect upon the validity of a marriage.

before being anything else, that is, before its further specification as a generative union characterized by the right to procreative acts. Whereas the theology of the thirteenth century in particular had given a central, though juridically ambiguous (to say the least), position to the personal union of husband and wife, the canonists of later centuries (notably in the decades immediately preceding the publication of the Code of Canon Law) had focused upon the ius in corpus, both in their definitions of marriage and their identification of the object of matrimonial consent.

Cardinal Gasparri, greatly influential in both the composition and the interpretation of the Code, saw even in the individua consuetudo vitae of the romano-canonical terminology a reference to carnal copula. And for juridical purposes, he asserted, the right to carnal copula was the only aspect of the consuetudo which was essential.

The Code of Canon Law itself avoided the traditional definition of marriage and stated that the object of consent was the exclusive and perpetual right to conjugal sexual acts. The commentators of the Code almost unanimously followed Gasparri in affirming that the societal-personal side of marriage was important for the full meaning of marriage (its integritas), but possessed little relevance with respect to its juridical structure.

The encyclical Casti Connubii, despite its development of the personal dimension of the marital union, held firmly to the teaching on the primacy of the procreative side of marriage, a teaching later reinforced and elaborated upon by Arthur Wymen of the Rota, by the Holy Office, and by Pope Pius XII. The "conjugal society" of the medieval theologians was not very visible in the canonical consideration of marriage during the era of the Code of Canon Law.

## CHAPTER V-

### CONCILIAR, AND POST-CONCILIAR TEACHING

#### 1. Vatican Council II.

##### a) History of the Texts.

i - "Votum de matrimonii sacramento":- In preparation for Vatican II, the Congregations of the Roman Curia were among the various groups and individuals requested to submit proposals for consideration in the Council. At least two of these Congregations, the Holy Office and the Congregation for the Discipline of the Sacraments, indicated that marriage would be among their concerns. An initial schema composed by the Holy Office, emphasizing modern-day errors to be combatted, proposed to treat marriage from two perspectives, sacramental and moral. The schema envisioned "recalling, clarifying, and confirming", among other aspects of marriage, its "origin, purpose, essential properties, and use".<sup>1</sup> The Congregation for the Discipline of the Sacraments proposed a review of several of the canons on marriage, but nothing which touched upon finality or which substantially affected the object of consent.<sup>2</sup> The same Congregation later (March,

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<sup>1</sup> Acta et documenta Concilio Oecumenico Vaticano II apparando, series 1, Vol. 3, p. 13.

<sup>2</sup> Ibid., pp. 93 ss.

1962) produced a text on matrimonial consent which dealt only in passing with the object of consent, identifying it as the ius coniugii proprium and explaining this expression by a reference to canon 1081 #2.<sup>3</sup>

The document on marriage which had been proposed by the Holy Office, however, emerged as a rather comprehensive text, presented by the Theological Commission to the Central Preparatory Commission for the Council and discussed by this Commission in May, 1962.<sup>4</sup> The document was titled De castitate, virginitate, matrimonio, familia and dealt specifically with, among other matters, the ends of marriage. In the section entitled Matrimonii fines it stated:

Furthermore marriage has in itself, that is, independently of the intention of the contractants, its divinely established ends. Of these, as appears from the divine plan of institution, the teaching of nature itself, and the magisterium of the Church, the primary end is solely the procreation and education of offspring, even if a particular marriage might not result in children. And therefore the procreation of offspring, although it is not the object of matrimonial consent, is itself still connatural to every marriage, even essential, in the sense that there can be no human intention which would exclude it by acts which are contrary to nature. It is also essential

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3 Ibid., series 2, Vol. 3, pars 1, p. 528.

4 Ibid., series 2, Vol. 3, pars 1, p. 90; and series 2, Vol. 2, pars 3, pp. 937-938. The latter reference is to the relatio of Cardinal Ottaviani on the text, where he also explains its nature as a "pastoral, dogmatic, and doctrinal" document, although not a text of pastoral discipline.

insofar as in every valid act of consent there is included the perpetual and exclusive right to acts which are of themselves naturally suitable for the generation of offspring, these acts being the proper object of consent. Finally, [procreation] is primary and prevalent in that it is not dependent upon other ends which are intended, even if they be natural ones; nor can it be given the same value as they or confused with them. For other objective ends of marriage, arising from the nature of marriage itself, yet secondary, such as the mutual aid of the spouses and the remedy for concupiscence, when rightly directed, give rise to marriage rights; subordinate to be sure; and therefore these secondary ends are not to be rejected or undervalued in themselves, but should be duly promoted in true charity.<sup>5</sup>

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<sup>5</sup> *Ibid.*, series 2, Vol. 3, pars 1, p. 106: "Habet insuper matrimonium in se, independenter scilicet ab intentione contrahentium, suos fines obiectivos divinitus statutos. Inter quos, attentata ratione divinae institutionis et docente ipsa natura necnon magisterio Ecclesiae, finis primarius unice est prolis procreatio atque educatio, etiamsi matrimonium particulare foecundum non sit. Atque ideo prolis procreatio, licet non sit obiectum consensus matrimonialis, tamen ita est per se omni coniugio connaturalis, immo hoc sensu essentialis, ut nulla humana voluntate actibus contra naturam excludi possit; ita etiam essentialis, ut in quovis valido consensu, ius perpetuum et exclusivum ad actus per se ad prolis generationem naturaliter aptos veluti obiectum proprium tradendum includatur; ita demum est primaria et praevalens, ut ab aliis finibus intentis, licet a natura indicatis, non dependeat, imo cum illis nec aequiparari neque confundi queat. Alii autem matrimonii fines obiectivi, ex indole ipsius matrimonii oriundi sed secundarii, ut mutuum coniugum adiutorium et concupiscentiae remedium, debite intenti iura quamvis subordinata in matrimonio constituunt, et ideo isti secundarii fines in se non sunt spernendi vel parvipendendi, sed debito modo in vera charitate promovendi."

This passage, like the entire text, is lavishly documented, with most references being to Casti Connubii and addresses of Pope Pius XII. Following this passage there is another which treats of errors to be condemned, among which are "theories which overturn the right order of values;

A document which was substantially identical to this text of the Theological Commission was sent to the bishops prior to the first session of the Council, but it was never discussed in the Council itself.<sup>6</sup> In January of 1963, after the first session of the Council, the Coordinating Commission of the Council ordered that the various schemata on marriage be reduced to a single document; and this task was given to the Conciliar Commission for the Discipline of the Sacraments. This latter Commission reported that it received for this purpose six previously-composed schemata, from which it prepared its own text, the Decretum de matrimonii sacramento, consisting of five chapters with an introduction and a concluding "pastoral instruction" on preparing couples for marriage.<sup>7</sup> This document, which contained scarcely any trace of the statements on the ends of marriage of the earlier text of the Theological Commission, and whose only

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5 (cont'd) which put before the primary end of marriage the biological and personal values for the spouses; and which assert that conjugal love is the primary end in the objective order itself". H. Doms is one of those cited in this regard. Ibid., p. 107.

( 6 See P. Delhaye, "Dignité du mariage et de la famille", in L'Eglise dans le monde de ce temps, tom. 2, pp. 387-391; also B. Häring, "Fostering the Nobility of Marriage and the Family", in H. Vorgrimler, ed., Commentary on the Documents of Vatican II, Vol. 5, p. 225.

7 Acta Synodalia sacrosancti Concilii Oecumenici Vaticani II, Vol. 3, periodus 3, pars 8, pp. 1068-1083, 1147-1149.

mention of the object of matrimonial consent was a reference to the ius coniugii proprium, was sent to the bishops in July, 1963, before the second session of the Council.<sup>8</sup>

The bishops were asked to forward their observations, which were then studied, in late 1963, by various subcommissions organized for the purpose. In January, 1964, however, the Coordinating Commission requested that the decretum on marriage be further reduced to a simple votum. The Conciliar Commission for the Discipline of the Sacraments, still responsible for the document, duly rewrote the text in the form of a very brief votum which was approved for transmission to the bishops in April, 1964, prior to the Council's third session. The bishops' general reaction to this text was that it was too short; and therefore the Commission for the Discipline of the Sacraments enlarged it somewhat.

The final Votum de matrimonii sacramento was distributed to the Fathers in the Council on November 10, 1964. There followed some discussion of the text, the bulk of which dealt with matrimonial impediments, mixed marriages, the form of marriage, and pastoral preparation for marriage; and on November 20, at the end of the Council's third session, the bishops voted to remit the document, along with all the observations made on it, to the Holy Father for

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<sup>8</sup> Ibid., pp. 1073, 1148-1149.

consideration by the appropriate body in the future revision of the Code of Canon Law.<sup>9</sup>

Thus it came about that the earliest proposed treatments of the sacrament of marriage never resulted in a conciliar document. The comprehensive and very "traditional" text of the Holy Office and the Theological Commission disappeared from view after the first session of the Council and without having been discussed therein. Its eventual replacement, the Decretum de matrimonii sacramento, after having itself been superseded by a short votum, was clearly too sketchy to be considered as the basis for a conciliar statement.

ii - Part II, Chapter I of Gaudium et Spes: "De dignitate matrimonii et familiae fovenda":- The history of the Pastoral Constitution Gaudium et Spes of Vatican Council II began in the late fall of 1962, toward the end of the Council's first session. Some of the Council Fathers and theologians conceived the idea of a document which would include statements on marriage and the family. The work of drafting a text on marriage was initiated in a subcommission which met between the first and second sessions, a body

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<sup>9</sup> The history of this text is related ibid., pp. 670, 675, and 1147-1158. The text of the votum, both the textus prior and the textus emendatus, is found there also, pp. 467-475.

among whose members were those who desired a document similar in spirit and content to the Theological Commission's earlier statement, De castitate, virginitate, matrimonio, familia.

Other members, wishing to emphasize marriage as a community of love, disagreed with this approach; and the text eventually arrived at a compromise. It was largely the work of the German theologian, Bernhard Häring.<sup>10</sup>

This early text of Gaudium et Spes (then known as "Schema 17"), of which the section on marriage formed the third chapter, was not put before the Council for discussion in the second session (September 29 - December 4, 1963), the Central Commission considering the text not yet mature. In the early months of 1964, between the second and third sessions of the Council, the document was reworked; and in July of 1964 the Pope approved it for distribution to the Fathers. It was now called "Schema 13", De Ecclesia in mundo huius temporis.<sup>11</sup>

The main body of this text came up for consideration in the third session (September 14 - November 21, 1964); but

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<sup>10</sup> See J. Ratzinger, Theological Highlights of Vatican II, pp. 147-148; B. Häring, loc. cit., p. 225; P. Delhaye, loc. cit., pp. 395-397.

<sup>11</sup> See B. Häring, loc. cit., pp. 225-226; P. Delhaye, loc. cit., p. 398; C. Moeller, "History of the Constitution", in H. Vorgrimler, ed., Commentary on the Documents of Vatican II, Vol. 5, p. 37.

the discussion did not include the major section on marriage, which was no longer part of the schema proper, but only an appendix. This appendix on matrimony and the family contained several references to marriage as a community in the service of new life and even included a citation of the Decree of the Holy Office of April 1, 1944. Its main emphasis, however, was on the conjugal society as a community of love. It avoided a discussion of the "end of marriage".

Chapter four of the schema itself (not the appendix), however, contained a few paragraphs on marriage which summarized the main points of the marriage and family section of the appendix. And these paragraphs occasioned a spirited debate in the Council. Several Fathers, notably Cardinals Ruffini, Ottaviani, and Browne, were critical of the major emphasis given in the text to conjugal love and of what seemed to be a lack of clarity regarding the role of procreation (the problem of the regulation of births being at the time a particularly pressing question). Cardinal Browne pointedly recalled the "certain" teaching of the Church on the primary and secondary ends of marriage. On the other hand, such Fathers as Cardinals Léger, Suenens, Alfrink, Patriarch Maximos, and Bishop Reuss defended the "personalistic" tone of the text. Cardinal Léger, in fact, spoke in favor of even more emphasis on conjugal love, asking

that it be clearly stated that love is a finis matrimonii. Besides the public discussion there were numerous written interventions on the subject. In the end the text was approved in principle, but a major reworking of it was called for.<sup>12</sup>

Between sessions three and four of the Council the appendix chapters of the schema, which included the main treatment of marriage, were made part of the Constitution itself. Thus the marriage section, having been rather thoroughly revised, became chapter one of part two of Gaudium et Spes. The text came up again for debate in the Council's fourth session (September 14 - December 8, 1965). The positions taken regarding the text - which had clearly from its beginning been a compromise among various points of view - could be roughly categorized as three: a minority of Fathers wished the text to reaffirm explicitly the scheme of the hierarchy of ends and the primacy of procreation; others wanted the document to place more stress on the importance of love and the personal dimension of marriage; and still

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<sup>12</sup> The short marriage section of the schema proper, a history of the draft, and the longer appendix on marriage and the family are found in Acta Synodalia sacrosancti Concilii Oecumenici Vaticani II, Vol. 3, periodus 3, pars 5, passim between pp. 129-168. The Fathers' speeches are printed ibid., Vol. 3, periodus 3, pars 6, passim.

See also J. Ratzinger, op. cit., pp. 149-150; B. Häring, loc. cit., p. 226; P. Delhaye, loc. cit., pp. 400-401; C. Moeller, loc. cit., pp. 42-49.

others held various middle positions. As was explained in the relatio accompanying the introduction of the text in the fourth conciliar session, one of the main concerns of those who drafted the document, in accordance with the wishes of many of the Fathers, was to "unite the two principal goods of marriage, procreation and love". A certain preeminence ("praestantia") was attributed to offspring; but as before, the text carefully avoided a discussion of "ends" themselves and particularly any mention of a hierarchy of ends.<sup>13</sup>

As had happened in the third session, the document's treatment of matrimonial finality gave rise to debate. Cardinals Ruffini and Browne and Bishop Alonso Muñozerro, speaking on September 29 and 30, severely criticized the schema for its departure in language and spirit from the framework of the primary-secondary ends. This traditional teaching, they said, was the accepted doctrine of the Church, as was clearly indicated by the Code of Canon Law (canon 1013 #1) and the Decree of the Holy Office, April 1, 1944.<sup>14</sup>

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<sup>13</sup> The marriage section of Gaudium et Spes at this stage of its development, as well as the detailed relatio explaining it, is found in Acta Synodalia...., Vol. 4, periodus 4, pars 1, pp. 435-482, 533-541. See in addition B. Häring, loc. cit., p. 227; J. Ratzinger, op. cit., pp. 150-151; P. Delhaye, loc. cit., pp. 410-416; C. Moeller, loc. cit., pp. 52-59.

<sup>14</sup> Acta Synodalia...., Vol. 4, periodus 4, pars 3, pp. 17-20, 37-39, 67-69.

After this debate the schema was returned to its sub-commission and a month later, in November, 1965, was again put before the Council for a detailed vote. The marriage section, along with the rest of the schema, had undergone slight revision. It was explained in an accompanying relatio that whereas some Fathers had wished for a more detailed exposition of the time-honored "fines et bona" of marriage, others had requested that a more complete treatment of the "personalistic and spiritual ends" be given. As a result the text remained substantially the same as before in this regard, most alterations being minor changes of expression. The vote in Council on this latest version was overwhelmingly favorable, although a number of Fathers submitted modi (suggestions for change) for the marriage chapter. According to the rules of procedure, the votes placet iuxta modum were not numerous enough to force a substantial alteration of the chapter; thus they were taken into account only insofar as they served to clarify the text. In early December the Pastoral Constitution Gaudium et Spes, together with its chapter on marriage and the family, De dignitate matrimonii et familiae fovenda, came before the Fathers for the last time and was given final approval. The most contested chapter was that on marriage, 2047 placet and

155 non placet votes.<sup>15</sup>

b) The Teaching of "Gaudium et Spes".

Part II, Chapter I of Gaudium et Spes, "Fostering the Dignity of Marriage and the Family", was by far the most significant pronouncement of Vatican Council II on the subject of marriage. Gaudium et Spes was designated a "Pastoral Constitution". The reasoning behind this designation was, first, that the principal aim of the document was not to expound doctrine directly, but to apply doctrinal beliefs to present circumstances. It was not titled, therefore, a Dogmatic Constitution, as was the Constitution on the Church (Lumen Gentium) which Gaudium et Spes to some extent complemented. Secondly, the document was more aptly named a Constitution than a Decree or a Declaration. The last designation might have caused the text to appear to be of less consequence than was intended; a Decree, on the other

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<sup>15</sup> The text (with its relationes) for which the modi were submitted is found in Acta Synodalia...., Vol. 4, periodus 4, pars 6, pp. 474-491. The author does not yet have access to the volumes of the Acta Synodalia containing the records of the Council from mid-November, 1965, to its conclusion, volumes still in the process of publication. For these records of the last several weeks of the Council the author relies on documents which were passed out in the Council itself and which have kindly been made available by J.-M.-R. Tillard, O.P., of the Collège dominicain, Ottawa, Canada.

For the events described here see also P. Delhaye, loc. cit., pp. 416-418; Idem, "Esquisse d'une axiologie chrétienne", in L'Ami du clergé, 42(1966), p. 599; C. Moeller, loc. cit., pp. 60-70; B. Haring, loc. cit., p. 227.

hand, generally contains prescriptions to be followed; and Gaudium et Spes imposed few, if any mandates.<sup>16</sup> The stated purpose of the chapter on marriage was to "offer guidance and support" to Christians and others "by presenting certain key points of Church doctrine in a clearer light".<sup>17</sup> On the whole the text carefully avoids the use of technical and juridical language.

i - The Description of Marriage and Matrimonial

Consent:- The very terminology employed in Gaudium et Spes to identify and describe marriage is not without interest. In article 48 marriage is called an "intimate community of conjugal life and love" (intima communitas vitae et amoris coniugalis), a "sacred bond" (vinculum sacrum), a "marital covenant" (foedus coniugale); spouses assist each other by virtue of an "intimate union of their persons and actions" (intima personarum atque operum coniunctio). In article 50 marriage is designated a "consuetudo and communion of the whole of life" (totius vitae consuetudo et communio). The expressions consortium vitae and coniugalis societas are not found, but much of the terminology of Gaudium et Spes clearly

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<sup>16</sup> See, for instance, Acta Synodalia...., Vol. 4, periodus 4, pars 1, p. 521; also C. Moeller, loc. cit., p. 69.

<sup>17</sup> Gaudium et Spes, art. 48, paragraph 4. The author has made use of the several English texts which are available, although the translation is ultimately his own.

recalls the Roman and medieval expressions. It is likewise clear, not only from the terminology but also from the entire treatment of marriage in the document (for example, its repeated emphasis on conjugal love), that it was the intention of the Council Fathers to attribute great importance to the personal dimension of matrimony.<sup>18</sup>

The process by which marriage is brought into being is, in the words of Gaudium et Spes, article 48, the entering of a "covenant of matrimony" (foedus coniugii), by an act of "irrevocable personal consent" (irrevocabilis consensus personalis).<sup>19</sup> This evidently involves no basic change of doctrine from the Code of Canon Law (canon 1081), which employs the terms consensus partium and actus voluntatis to explain the same process. The object of matrimonial consent

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<sup>18</sup> However, as U. Navarrete notes, it cannot be asserted that the personal aspect of marriage is presented in Gaudium et Spes as a distinct right, to be placed alongside other matrimonial rights. A fortiori, the conciliar document did not attempt to determine the juridical significance of such a right. The term communio vitae and similar expressions of the Pastoral Constitution describe marriage as a whole, while certainly underlining its personal element. See U. Navarrete, "De iure ad vitae communionem: observationes ad novum Schema canonis 1086 #2", in Periodica, 66(1977), pp. 259, 263; also Idem, "Structura iuridica matrimonii secundum Concilium Vaticanum II", in Periodica, 57(1968), p. 148.

<sup>19</sup> Regarding the word "foedus", it is explained in a relatio that "the biblical term 'foedus' is added to the text in consideration of the Orientals, for whom 'contractus' presents some difficulties". Acta Synodalia...., Vol. 4, periodus 4, pars 1, p. 536.

is identified in the same article of Gaudium et Spes, number 48, as the persons of the spouses themselves: they "each give and accept each other" (coniuges sese mutuo tradunt atque accipiunt). Evidently the document is not speaking here in completely juridical terms, although there was an effort made in the Council to have it do so. At the voting session of November 16, 1965, when modi were allowed, thirty-four Fathers requested that the object of consent be identified as "specific rights and duties" in place of the persons of the spouses themselves. In addition 190 Fathers asked that the same text read that the spouses consent to the "ius in corpus, perpetuum et exclusivum, in ordine ad actus per se aptos ad prolis generationem, as formulated in the Code of Canon Law. The response of the conciliar commission to the first request was that rights do not exist without objects and that in marriage the object involves the spouses themselves. Furthermore, the commission said, the expression traditio personae is an acceptable one, having been used in Casti Connubii. To the motion that the object of consent be identified as the ius in corpus the reply was given that, in a pastoral text which is intended to engage in a dialogue with the world this type of juridical

specification is not required.<sup>20</sup> Thus the formulation of the Code was not itself challenged or rejected; rather, it was judged inappropriate for the conciliar text.

ii - The Ends of Marriage:- If the topic of the juridical object of matrimonial consent was not a serious concern of Gaudium et Spes, the same cannot be said for the question of the ends of marriage. Throughout the entire chapter on marriage and the family there is an interplay between the procreative purpose of matrimony and its personal dimension, the bonum coniugum. In article 48 it is said that after true matrimonial consent is given,

this sacred bond does not depend [for its existence] on human decisions, for the good of the spouses, their offspring, and society. For God himself is the author of marriage, endowed as it is with various goods and ends (variis bonis ac finibus praediti). [...] By their very nature, the institution of marriage itself and conjugal love are ordered to the procreation and education of children and find in them their crowning glory (iisque veluti suo fastigio coronantur). [...] This intimate union, being the mutual gift of two persons, as well as the good of the children, demand total fidelity of the spouses and require their indissoluble unity.

It is significant that in this passage the properties which are attributed to marriage (indissolubility and fidelity) are presented as arising from or required by both the personal

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<sup>20</sup> De Ecclesia in mundo huius temporis. Expensio modorum partis secundae, ad num. 48, #15b et Resp., pp. 12-13 of the text distributed in the Council.

union of the spouses and the good of offspring. Marriage is also said to be endowed with "various goods and ends". The 190 Fathers who proposed in the Council on November 16, 1965, that the object of consent be specified to be the ius in corpus also requested that the various goods and ends be said to be "hierarchically related" (hierarchice connexa). The response of the commission was, perhaps, somewhat ambiguous. The commission replied, first, that in this passage the natural phenomenon of marriage was being discussed, and therefore it was not the place to enumerate the "Christian goods" of marriage "as a sacrament". Secondly, the commission pointed out, the accompanying footnote indicated the traditional doctrine.<sup>21</sup> Thirdly, the commission said, the "hierarchy of goods" is capable of being looked at from different viewpoints (and there was cited here a passage of Casti Connubii, A.A.S., 22[1930], p. 547, which speaks of conjugal love). Fourthly, the commission responded, the

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<sup>21</sup> The commission was also replying here to a request that the bona matrimonii be explicitly mentioned in the conciliar text. The references in the footnote (Gaudium et Spes, article 48, note 1) are to St. Augustine, De bono coniugali, PL 40, 375-376, 394; St. Thomas, Summa theologiae, Suppl., q. 49, art. 3, ad 1; Decretum pro Armenis, Denzinger, 702(1327); Casti Connubii, A.A.S., 22(1930), pp. 543-555. These texts all have to do with the bona matrimonii and not the finis. Even here, the only text which unequivocally states that the bonum prolis is the primary good is Casti Connubii, which does so while developing the notions of the bonum fidei and conjugal love. In short, none of the texts cited speak of a hierarchy of ends. Notably absent is any reference to Pope Pius XII or to the Decree of the Holy Office, April 1, 1944.

expression "hierarchically related" is too technical. Finally, it said, the "primordial importance" (momentum primordiale) of the procreation and education of offspring "is at least ten times expounded in the text".<sup>22</sup> At its face value the commission's reply seemed to indicate that the primacy of the procreative end is acknowledged in the conciliar document. However, its reference to Casti Connubii and the statement that a "hierarchy of goods" can be seen from different aspects, as well as the history of the composition of this chapter of Gaudium et Spes and its deliberate avoidance throughout of any reference to a hierarchy among ends, makes it appear that the commission was simply refraining from taking up the question again, after it had been so often debated.<sup>23</sup> Whatever the mind of the commission, however, the conciliar document itself makes no mention here or elsewhere of a hierarchy of purposes of marriage.

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<sup>22</sup> The modi and the responses to them are found in the Expensio modorum to part two of Gaudium et Spes (the document identified above, note 20), ad num. 48, #15c, f, et Resp.

<sup>23</sup> U. Navarrete, "Structura iuridica matrimonii secundum Concilium Vaticanum II", in Periodica, Vol. 56(1967), pp. 374 ss., considers this response of the commission to be an indication of the acceptance of the primacy of the procreative end. B. Haring, on the other hand, loc. cit., p. 233, finds in the same response a rejection of such a position.

The procreative finality of marriage is pointedly asserted several times in Gaudium et Spes. In article 48 it is stated, as was just seen, that "by their very nature" (indole sua naturali) marriage and conjugal love "are ordered to the procreation and education of children and find in them their crowning glory" (isque veluti suo fastigio coronantur). This final text is actually a stronger statement on the importance of procreation than were earlier drafts, and it came about by yet another effort to please both the Fathers who wished to stress the generative aspect of marriage and those who preferred to underline the personal element. "Indole sua naturali" indicates the innate finality of marriage, while "veluti suo fastigio" is a somewhat weaker expression than would be, for instance, "veluti fine primario" (and is of course less technical).<sup>24</sup>

Later, in article 50, the section specifically devoted to the procreative side of marriage, it is stated:

Marriage and conjugal love are by their nature (indole sua) ordered to the procreation and education of offspring. Children are truly the supreme gift of marriage (praestantissimum matrimonii donum) and contribute most substantially to the welfare of their parents. [...] Thus the true practice of conjugal love and the whole meaning of the family life resulting from it, while not making the other purposes of marriage of less account (non posthabitis ceteris matrimonii finibus), direct the spouses to courageously cooperate with the love of the Creator and Saviour [...].

<sup>24</sup> This is discussed by U. Navarrete, loc. cit., pp. 374-377.

Marriage, to be sure, was not instituted only for procreation (non est tantum ad procreationem institutum); but its very nature as an indissoluble covenant between persons, as well as the good of the children, demand that the mutual love of the spouses be properly manifested, grow, and mature.

Again it can be seen that in the formulations of Gaudium et Spes it is both marriage and conjugal love which are by nature directed to offspring. The history of the text reveals that the use of the expressions praestantissimum matrimonii donum and non posthabitis ceteris matrimonii finibus was a deliberate attempt to assert the importance of the procreative finality of marriage while refraining from any statement regarding a hierarchy or relative value of ends. The phrase non est tantum ad procreationem institutum was a revision of an earlier and somewhat harsher expression, "matrimonium non est merum procreationis instrumentum".<sup>25</sup>

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The significance of the marriage teaching of Gaudium et Spes for this study is mainly twofold. First, the conciliar document when describing marriage consistently

<sup>25</sup> See U. Navarrete, ibid., pp. 377-381; B. Häring, loc. cit., pp. 239-240; P. Delhaye, "Esquisse d'une axiologie chrétienne", loc. cit., pp. 600-601. Häring and Delhaye relate also that a proposal was made to replace "praestantissimum matrimonii donum" with "bonum", but the suggestion was not followed. It was perhaps too "Augustinian" and might possibly have been construed as a reaffirmation of the primacy of procreation.

employs a terminology which is much closer to the Roman and medieval language and concepts than to the more juridical expressions which were characteristic of the period from the mid-nineteenth century until, and including, the Code of Canon Law and the papacy of Pius XII. This terminology of the Pastoral Constitution was not accidental, but was carefully chosen, primarily in order to underscore the Church's concern with the personal dimension of marriage.

Secondly, the Council Fathers were keenly aware of the canonico-theological question of the ends of marriage; and they sought on the whole to restore to a more even balance the differing poles of the procreative and conjugal-personal elements. The overwhelmingly favorable vote which the document received in the Council indicates the extent to which the bishops approved of the emphasis given by Gaudium et Spes to marital love and the bonum coniugum. Still, there is a sense in which it is accurate to say that the conciliar document is more significant in what it did not state than in what it did assert. It maintained a deliberate and conspicuous silence (despite numerous attempts of some Council members to effect the contrary) on the problem of the relative importance and hierarchy of the finis matrimonii. It cannot be said that Gaudium et Spes overturned the primary-secondary scheme of ends. But neither can it be asserted that it upheld and affirmed such a formulation. The document

staunchly maintained that both the procreative and the personal dimensions of marriage were essential to its meaning and that an exaggeration of either aspect to the detriment of the other was contrary to Catholic teaching. It would have to be left to subsequent canonical reflection to draw juridical consequences from the conciliar teaching, if in fact there were any juridical consequences to be drawn.<sup>26</sup>

## 2. Post-Conciliar Developments.

### a) Papal Teaching: "Humanae Vitae".

The Encyclical Letter Humanae Vitae of Pope Paul VI, issued July 25, 1968, had to some extent been anticipated by Gaudium et Spes when, in article 51, note 14, of the conciliar document, it was stated that it would be left to the Supreme Pontiff to pass judgment on the question of the regulation of births. It was this moral problem which the encyclical addressed. Humanae Vitae thus dealt directly not

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<sup>26</sup> There have been many attempts to evaluate from a juridical viewpoint the teaching of Gaudium et Spes on the ends of marriage, most of them inconclusive. See inter alios U. Navarrete, loc. cit., pp. 382-393, who believes that the conciliar teaching on the whole upheld the doctrine of the hierarchy of ends while developing the personal dimension of marriage. Others would not be in complete agreement with Navarrete; for instance, V. Fagiolo, "Essenza e fini del matrimonio secondo la Costituzione Pastorale 'Gaudium et Spes' del Vaticano II", in Ephemerides Iuris Canonici, 23 (1967), pp. 176-179; and B. Haring, loc. cit., passim.

with the question of the finality of marriage itself, but with the finality of the conjugal act. The key assertion of the encyclical was that "every conjugal act must per se remain open to the procreation of human life."<sup>27</sup>

In laying the groundwork for this reaffirmation of the Church's traditional teaching, Humanae Vitae did state that the Church has always, and particularly in recent times, provided a coherent teaching on both the nature of marriage and the correct use of conjugal rights (i.e., sexual activity). In an accompanying footnote to this statement there are a number of citations of earlier ecclesiastical documents, among them passages from Casti Connubii and several allocutions of Pope Pius XII in which is affirmed the subordination of the secondary ends of marriage to the primary end. In the context of the encyclical, however, it seems quite clear that it was not the intent of Humanae Vitae to settle or even address this canonico-doctrinal question. This conclusion is strengthened by the fact that there is direct reference in the footnote to the Code of Canon Law itself, to canons dealing with the matrimonial impediments of non-age, impotence, and consanguinity - but not to canon 1013, where the finis matrimonii are identified and categorized

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27 Humanae Vitae, No. 11: A.A.S., 60(1968), p. 488.

as primary - secondary.<sup>28</sup>

Of more interest for the present study is the fact that the encyclical consistently speaks of marriage in language quite similar to that of Gaudium et Spes. Conjugal love and responsible parenthood (paternitas sui officii conscia) are "two weighty elements of matrimonial life" (duo haec gravia vitae matrimonialis elementa).<sup>29</sup> Love between spouses is analyzed and asserted to be plane humanus, plenus, fidelis et exclusorius, as well as fecundus. This last characteristic of conjugal love is described by a quotation from Gaudium et Spes, article 50: "Marriage and conjugal love are by their nature ordered to the procreation and education of offspring."<sup>30</sup> The conjugal act itself is possessed of an inherent twofold meaning, unity and procreation (utraque...essentialis ratio, unitatis videlicet et procreationis).<sup>31</sup>

Not unlike Gaudium et Spes, the encyclical Humanae Vitae deserves mention in this investigation by reason of what it avoids stating as well as its positive teaching. In

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<sup>28</sup> Humanae Vitae, No. 4, note 4: A.A.S., loc. cit., pp. 483-484.

<sup>29</sup> Humanae Vitae, No. 7: A.A.S., loc. cit., p. 485.

<sup>30</sup> Humanae Vitae, No. 9: A.A.S., loc. cit., pp. 486-487.

<sup>31</sup> Humanae Vitae, No. 12: A.A.S., loc. cit., p. 489.

re-affirming the doctrine of the Church that every act of conjugal intercourse must be allowed its biological orientation to the possibility of generation, it abstains from direct reference to the "primary end of marriage", although such a reference would appear to have been a most natural argument to use (and had been used previously in Casti Connubii and by Pope Pius XII). And the encyclical followed Gaudium et Spes not only in its silence on the finis matrimonii, but also in its emphasis on conjugal love and the personal dimension of marriage. Thus, while not addressing the canonical question, Humanae Vitae certainly presented the moral aspect of marriage in highly "personalistic" terms.<sup>32</sup>

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<sup>32</sup> Brief mention might also be made of two subsequent statements of Pope Paul VI, an address to "Teams of Our Lady", May 4, 1970; and an allocution to members of the Roman Rota on February 9, 1976. In the former speech the Pope, somewhat in the manner of Pius XII, spoke of the fecundity of love and marriage and stressed again the personal aspect of marriage and its status as a "community of life (une communauté de vie) which finds fruitful expression in bodily self-giving" (A.A.S., 62/[1970], p. 430).

In his address to the Rota the Pope remarked that "conjugal love, even though it does not enter into the purview of law (etiamsi in iuris provincia non assumatur), nonetheless performs a most noble and necessary role in marriage" (A.A.S., 68/[1976], p. 207). It is fairly evident that the Pope did not intend here to enter into or decide a jurisprudential dispute on the subject, but rather to re-affirm the indissolubility of marriage after the giving of valid consent. He also remarked favorably on the fact that the Rota "has come to understand the full importance of the more personalist approach (plena...significatio rationis magis personalis) which the Council emphasizes in its teaching

## b) The Proposed New Law.

Two noteworthy aspects of the matrimonial teaching of Gaudium et Spes were, as was seen, the conciliar document's description of marriage as essentially a communio totius vitae et amoris (inherently ordered to procreation) - in other words, a consortium omnis vitae - and the silence (a somewhat ambiguous silence, to be sure) on a hierarchy of the ends of marriage. Both of these topics, the description of marriage itself and the fines matrimonii, were directly addressed by the committee responsible for drafting the new canon law of marriage.<sup>33</sup> Reporting decisions that had been taken by the committee between 1966 and 1971, P. Huizing, the group's relator at the time, stated:

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32 (cont'd) and which consists in rightly esteeming conjugal love and the mutual perfection of the spouses" (Ibid., p. 205; translation from The Pope Speaks, 21/[1976], p. 151). For a commentary on this speech, see U. Navarrete, "Amor coniugalis et consensus matrimonialis", in Periodica, 65(1976), pp. 619-632.

33 The project to revise the Code of Canon Law was announced by Pope John XXIII in January, 1959. In March of 1963 the same Pontiff established for this purpose the Pontifical Commission for the Revision of the Code of Canon Law. Among the various committees formed by the Commission was one for the revision of matrimonial law. The history of the Pontifical Commission and the work of its various committees are recorded passim in the periodical published by the Commission, Communicationes.

On the question of how there should be expressed in [the revised] can. 1013 #1 the personal relationship of the spouses, together with the ordering of marriage to procreation, such as is described in the Pastoral Constitution of Vatican Council II on the Church in the Modern World, Gaudium et Spes: the majority of the committee members finally agreed to affirm the nature of marriage as an intima totius vitae coniunctio between man and woman which, of its very nature, is ordered to the procreation and education of offspring. Following the Constitution, the committee decided that in this paragraph [i.e., paragraph one of canon 1013] the idea of the primary end, that is, the procreation and education of offspring, and the secondary end, namely mutual aid and the remedy for concupiscence, should no longer be employed. The second paragraph of the canon, which deals with the essential properties of marriage, should, it seemed, remain unchanged.<sup>34</sup>

And speaking of the projected chapter on the notion of matrimonial consent in the new code, Huizing reported:

As in canon 1013, the teaching of Vatican Council II on marriage and on matrimonial consent requires that in this chapter too several changes in the canons regarding marriage consent be introduced, namely with respect to the object of consent and to the defect of consent by reason of the exclusion of an essential element of that object. By majority vote of the committee consent is proposed as an act of the will whereby a man and a woman mutually pledge to enter a consortium vitae coniugalis, perpetual and exclusive, which of its very nature is ordered to the generation and education of offspring. Whence it follows that among the essential elements of the object of consent, the exclusion of which renders the consent invalid, there should be listed the ius ad vitae communionem. The result is that canon 1086 #2 would read thus: "But if either or both parties by a positive act of the will exclude marriage

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<sup>34</sup> Communicationes, 3(1971), p. 70.

itself; or the ius ad vitae communionem, or the right to the conjugal act, or an essential property of marriage, they contract invalidly." As will be evident to those who are acquainted with the subject, the expression the right to a communion of life was deliberately used, so that consent would be invalid only if in the very act of contracting marriage the communio vitae, insofar as it belongs to the essence of matrimony, should be excluded; that is, when "marriage" would be intended in such way that that right [to a communio vitae] would not be given to one of the parties. Furthermore, the communio vitae which is proper to marriage is not to be confused with cohabitation.<sup>35</sup>

When, in early 1975, there was distributed to various consultative bodies a preliminary draft of the new law on the sacraments,<sup>36</sup> these decisions of the marriage committee were incorporated in the proposed canons. Canon 1013 #1 (canon 243 of the schema) had been formulated to read:

Matrimonium, quod fit mutuo consensu de quo in cann. 295 ss., est (intima) totius vitae coniunctio inter virum et mulierem, quae, indole sua naturali, ad proles procreationem et educationem ordinatur.

Canons 1081 #2 and 1086 #2 (canons 295 and 303 of the schema), dealing respectively with the object of consent and

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<sup>35</sup> Ibid., pp. 75-76. It is of interest to note that the teaching of Gaudium et Spes on the "value of conjugal love and the communion of life" was also cited in early discussions on the matrimonial impediment of impotency and that the conciliar "personalist" teaching was taken into account in the committee's opinion that verum semen in testiculis elaboratum should not be required for canonical potency. Ibid., 6(1974), p. 187.

<sup>36</sup> Schema documenti pontificii quo disciplina de sacramentis recognoscitur.

invalidating exclusions, had been revised in this manner:

can. 295 #2: Consensus matrimonialis est actus voluntatis quo vir et mulier foedere inter se constituunt consortium vitae coniugalis, perpetuum et exclusivum, indole sua naturali ad prolem generandam et educandam ordinatum.

can. 303 #2: At si alterutra vel utraque pars positivo voluntatis actu excludat matrimonium ipsum aut ius ad vitae communionem, aut ius ad coniugalem actum, vel essentialem aliquam matrimonii proprietatem, invalide contrahit.

As was pointed out in the introduction to the schema's chapter on marriage, the proposed equivalent of canon 1013 #1 did not list the finis matrimonii; rather, a description of matrimonium in facto esse was given, along with an assertion of both its personal dimension and its ordering to procreation. And in the new canons 1081 and 1086 the ius ad vitae communionem was placed among the "essential elements of the object of consent". It was remarked, as had been done earlier in Communicationes, that this right to a communion of life is not the same thing as cohabitation.<sup>37</sup>

In early 1977 some members of the committee on marriage law (a "parvus coetus") met to consider the observations on the schema forwarded by the groups to which it had been sent. The coetus decided that the canon describing matrimonial consent and its object (canon 295 of the schema, 1081 of the Code of Canon Law) was more logically placed among

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<sup>37</sup> Ibid., pp. 13-14.

the preliminary canons; and they therefore voted to re-position it immediately after <sup>canon</sup> 243 of the schema (formerly canon 1013). This change made unnecessary an identification of the object of consent (this already being equivalently contained in canon 243: "matrimonium...est intima totius vitae coniunctio...quae...ad prolis procreationem et educationem ordinatur"); and it was decided that paragraph two of the canon on marriage consent, now canon 244 #2, should read:

Consensus matrimonialis est actus voluntatis  
quo vir et mulier sese mutuo tradunt et accipiunt  
ad constituendum matrimonium

Thus the explicit description of the object of consent as a consortium vitae coniugalis was no longer employed. The relative positioning of the new canons, however, made it clear that this "personal" element of marriage, along with its procreative aspect, formed part of the juridical object of consent. For the immediately preceding canon (243 #1 in the schema, 1013 #1 in the Code of Canon Law) - after having also been given a new formulation in this same meeting of the parvus coetus - was constructed to read:

Matrimonium est viri et mulieris intima  
totius vitae coniunctio quae indole sua naturali  
ad bonum coniugum atque ad prolis procreationem  
et educationem ordinatur.

The reasoning behind this new formulation of canon 243 #1 of the schema is worth noting. The coetus favored

(as had the consulting bodies) the retention of the word "intimate", even though "this word adds nothing to the canon in the conceptual and technical sense". It was also decided that the adjective "totius" should remain. Thirdly, there was some discussion over the use of the word "coniunctio" to describe marriage. Other words had been suggested, including "communio" and "consortium". Evidently the meaning of the various terms was the same; and the coetus agreed to keep "coniunctio". A fourth problem which was discussed in this connection was a slightly more substantial one. From the responses of the consulting bodies the question - actually a twofold question - had arisen: (a) whether an indirect affirmation of a hierarchy of ends underlay the formulation of the canon; and (b) whether it would not be opportune to make specific mention in the canon of other ends of marriage besides procreation. To this double question a member of the coetus responded that the canon had been wrongly interpreted if it was thought that it was here "directly affirmed that the end of marriage is procreation". Rather, he continued,

the intention of the coetus was to establish what marriage consists of. Marriage is fundamentally (fundamentaliter) a coniunctio vitae, a coniunctio which is ordered to offspring. The ends of marriage are included in this definition, because a coniunctio ordered to offspring entails procreation, and mutual aid, and the remedy for concupiscence, etc., without anything being said in the canon of a hierarchy of ends, either directly or indirectly.

After further discussion it was decided by the coetus that it would be advisable that explicit mention be made in the canon of the personal ends of marriage. It was for this reason that the new formulation of canon 243 #1 of the schema included the expression bonum coniugum as one of the elements (i.e., purposes) to which marriage is ordered.<sup>38</sup>

A similar question arose about the wording of canon 303 #2 of the schema (1086 #2 of the Code), in which invalidating exclusions of the essential elements of the object of consent were identified. As was mentioned, the canon had been formulated to specify that among these necessary elements of the object of consent was the ius ad vitae communionem. Observations had been received from the consulting bodies which pointed out the need for clarifying the concept. The coetus reported that the expression ius ad vitae communionem was intended to refer to those "rights which pertain to the essential interpersonal relations of the spouses, relations which in the contemporary milieu are considered as the complex of rights distinct from other rights which were generally listed in the traditional teaching." After further discussion the coetus voted,

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<sup>38</sup> This discussion and resolution of the questions surrounding the canons on the notion of marriage and the object of consent is found in Communicationes, 9(1977), pp. 117-125.

apparently in the interest of clarity; to modify the expression "ius in vitae communionem" to read "ius ad ea quae vitae communionem essentialiter constituunt".<sup>39</sup>

These discussions of the coetus after the publication of the 1975 schema indicated a continuing concern (on the part of some of the consultative bodies as well as the marriage committee of the Commission for the Revision of the Code) over one of the principal ideas underlying the proposed new marriage law, the very notion of marriage as a communio, or a consortium vitae. This concern had been accurately expressed in remarks made by some of the consultative groups, as reported by the coetus:

The question has been raised about the meaning, not strictly juridical, of certain words or expressions which have been taken over [in the proposed law] from the teachings of Vatican Council II. [The consulting bodies] have adverted to the fact that a number of statements were made in the Council in a pastoral sense which cannot simply be transferred to a juridical text, where they receive a new value which entails consequences for the very validity of marriage.<sup>40</sup>

The question therefore involved the concept of the consortium vitae (however expressed) as a juridical entity. There were evidently lingering doubts about the validity of such a concept; for at a Plenary Congregation of the Cardinals

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<sup>39</sup> Communicationes, 9(1977), p. 375.

<sup>40</sup> Ibid., p. 118.

of the Commission for the Revision of the Code in May, 1977, a threefold question was put before the group: (a) Should the new Code contain a description of marriage? (b) If so, should the description include the element of the "coniunctio vitae (communio, consortium)"? (c) What then would be the juridical value of this element for the validity of marriage? The questions were posed, it was remarked, "in via consultiva tantum".

The Cardinals of the Commission overwhelmingly agreed that there should be in the new Code a description of marriage, "sed potius forma descriptiva et in obliquo"; and the description should refer to marriage in fieri, indicating only its essential elements. The Cardinals also thought that the notion of coniunctio vitae (which could be expressed in several ways, it was said, such as consortium vitae, or communio vitae) should be included in the description of marriage, "as long as expressions are avoided which can furnish an opportunity for false interpretations in jurisprudence". Thirdly, the Cardinals were of the opinion that this element of coniunctio vitae should be accorded juridical value with respect to the validity of marriage (looking always, they said, at the act of consent, and not, of course, at marriage in facto esse).<sup>41</sup> Following the opinions of the Cardinals,

<sup>41</sup> Ibid., pp. 79-80, 211-212.

and also deciding to incorporate in a single canon both a description of marriage and the notion of its sacramentality, the marriage coetus subsequently, in February, 1978, decided to re-formulate canon 243 #1 (canon 1013 #1 of the Code of Canon Law, and now - with two canons reduced to one - canon 242 #1 of the schema) in this manner:

Matrimoniale foedus, quo vir et mulier intimam inter se constituunt totius vitae communionem, indole sua naturali ad bonum coniugum atque ad prolis procreationem et educationem ordinatam, a Christo Domino ad sacramenti dignitatem inter baptizatos evectum est.<sup>42</sup>

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The significance of these preliminary drafts - and of the reasoning behind them - of the new canon law of marriage is not difficult to appreciate. For one thing, the hierarchy of the ends of marriage, asserted in the Code of Canon Law and so strongly re-affirmed in subsequent papal and jurisprudential statements, is completely avoided. Secondly, the concept of marriage as a consortium omnis vitae

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<sup>42</sup> Ibid., 10(1978), pp. 125-126. A translation might read: "The marriage pact, whereby a man and woman together bring about a communion of the whole of life, and which of its very nature is ordered to the good of the spouses and to the procreation and education of offspring, has been raised by Christ the Lord to the dignity of a sacrament for baptized persons."

has been given juridical import in the proposed new canons. The compilers of the new law justify the canonical status accorded the consortium by pointing to Gaudium et Spes; and in a real sense they are correct. It might not be inaccurate to observe, nevertheless, that there is a slight difference of meaning between the concept as it appears in the teaching of Gaudium et Spes and the ius ad vitae communionem of the proposed law. In the conciliar document the notion first of all describes marriage as a whole while, secondly, highlighting its personal dimension. In the proposed law the same concept designates primarily a specific ius matrimonii, distinct from the ius in corpus and even from matrimonium ipsum.<sup>43</sup> As U. Navarrete has remarked, the ius ad consortium vitae of the proposed law can be viewed as the practical equivalent of a ius ad mutuum adiutorium if this latter expression is understood to refer to "mutual aid" not in a superficial and merely external manner, but in a more profound (and even biblical) sense; it is not, for instance, simply a question of the communio mensae, lecti, et tori, as

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<sup>43</sup> As a further illustration of this, the marriage coetus, in its review of the 1975 schema, remarked at the possible ambiguity of certain expressions in the schema, such as "communio vitae coniugalis", "coniugalis communio", and "vitae consuetudo" (found in the section on the separation of spouses). These terms in their context referred primarily to cohabitation, and the decision was therefore made to change them to "coniugalis convictus". Communicationes, 10(1978), pp. 118-121.

is pointed out in schema.<sup>44</sup> The immediate problem raised - a problem clearly recognized by the compilers of the law - is the issue of determining concretely the rights and obligations encompassed by the ius ad consortium vitae, since it is proposed that this ius involve the very validity of marriage. Such a determination is the task not only of the law, but also - and perhaps chiefly - of ecclesiastical jurisprudence. The jurisprudential examination of the question, moreover, has already begun; and this is the subject of the next chapter.

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<sup>44</sup> U. Navarrete, "De iure ad vitae communionem: observationes ad novum Schema canonis 1086 #2", in Periodica, 66(1977), pp. 269-270. This author has also commented extensively on the proposed marriage law in "Mutationes et praevisae innovationes in iure matrimoniali", in Prawo Kanoniczne, 15(1972), pp. 3-17; and "Schema iuris recogniti 'De matrimonio'. Textus et observationes", in Periodica, 63(1974), pp. 611-658.

## CHAPTER VI

### RECENT ROMAN JURISPRUDENCE

For several reasons it is presently too early to be able to obtain a complete picture of the development of a jurisprudence on the consortium omnis vitae in the Roman tribunals. The Second Vatican Council is still a rather recent event. The new canon law continues to be in the drafting stage. And, of course, the decisions of the Rota are not officially published until ten years after they are given. Nevertheless the appearance in various canonical periodicals of a number of Rotal sentences (and of two from the Apostolic Signatura) having reference to marriage as a consortium makes it possible to discern some jurisprudential trends, the subject of this chapter.<sup>1</sup>

As far as possible the matrimonial decisions are studied here in chronological order. Occasionally, however, such an order has been put aside in favor of another which

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<sup>1</sup> The decisions to be studied in this chapter have been chosen from a total of approximately 200 sentences, most of them published in periodicals. These selected decisions are those which, with but few exceptions, make explicit mention - for or against - of the consortium omnis vitae (by whatever terminology) as a juridical element in marriage. A wider study, such as might examine an overall understanding of the object of matrimonial consent as presented, or implied, in post-Conciliar Rotal jurisprudence, would undoubtedly be useful, but would exceed the scope of this investigation.

seems to be more helpful for clarifying the development of patterns of jurisprudence when these can be seen.<sup>2</sup>

1. Early Post-Conciliar Jurisprudence: 1966-1968.

Although Vatican Council II came to an end in 1965, there is little evidence, in the years immediately following,

<sup>2</sup> There is likewise a growing canonical literature on marriage as a consortium vitae. Some studies appeared even before Vatican Council II, among them O. Giacchi, "Sulla essenza del matrimonio", in Jus, nuova serie, 1(1950), pp. 35-41; Idem, Il consenso nel matrimonio canonico, 1950 (a third and revised edition of which was published after the Council); and several studies by J. Hervada: Los Fines del Matrimonio. Su relevancia en la estructura jurídica matrimonial; "El matrimonio 'in facto esse'. Su estructura jurídica", in Ius Canonicum, 1(1961), pp. 135-175; "La 'ordinatio ad fines' en el matrimonio canónico", in R.E.D.C., 18(1963), pp. 439-499. For a pre-conciliar theological emphasis on the personal dimension of marriage see J. Ford - G. Kelly, Contemporary Moral Theology. Volume III: Marriage Questions, passim.

Several of the more noteworthy among the growing number of studies appearing since the Council are A. de la Hera, Relevancia jurídico-canónica de la cohabitación conyugal; Idem, "L'ordonnance du mariage à ses fins", in L'Année canonique, 17(1973), pp. 555-568; J. Hervada - P. Lombardía, El derecho del Pueblo de Dios. III, Derecho matrimonial, 1.; G. Mantuano, "La definizione giuridica del matrimonio nel magistero conciliare", in Atti del Congresso internazionale di diritto canonico: la Chiesa dopo il Concilio, II, pp. 891-903. Against the juridical value of the consortium vitae see, for instance, A. Gutierrez, "Matrimonii essentia, finis, amor coniugalis (Peculiari ratione habita conditionis mulieris excisae)", in Apollinaris, 46(1973), pp. 97-147, 394-445; 47(1974), pp. 92-130, 416-470; and a number of articles by P. Fedele, for example, "L' 'Ordinatio ad prolem' e i fini del matrimonio con particolare riferimento alla Costituzione 'Gaudium et Spes' del Concilio Vaticano II", in E.I.C., 23(1967), pp. 62-134.

of its description of marriage as an intima communitas vitae et amoris being given any special juridical consideration in the Rota. For instance, in a decision before Bejan in 1967 the expressions "consuetudo vitae conjugalis" and "consortium vitae" are used simply to denote cohabitation. It is asserted that "mutuum adiutorium" does not belong to the substance of marriage; and procreation is said to be "the sole specifying element of the marital contract". Cited in this regard are Gasparri and the decision coram Wynen of January 22, 1944.<sup>3</sup>

In a 1968 decision coram Fiore the Ponens explicitly addressed the question of the juridical value of certain expressions of Gaudium et Spes. He writes:

[.] although today there are many who believe that in the light of the Constitution Gaudium et Spes (n. 48) the "intima communitas vitae et amoris conjugalis" is of the essence of the matrimonial contract, the Fathers [of the Rotal turnus] are of the opinion that this is to be completely denied; the reason is that the communion of habitation, bed, and table belongs to the essence and integrity of the individua vita rather as an effect of validly-given consent.

As the continuation of the argument makes clear, the "intima communitas" is considered to be a "perfecting", but not an essential element of marriage; it would become a factor

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<sup>3</sup> Decision coram Bejan, March 1, 1967, in S.R.R. Dec., 59(1967), pp. 133-134; also in R.D.C., 19(1969), pp. 80-81.

influencing validity only if it entered the picture in another manner, as a positively-intended condition limiting consent, for instance.<sup>4</sup>

There are two interesting decisions given by the Rotal judge Vincenzo Fagiolo in these early years following Gaudium et Spes. In the first (May 18, 1968) the Ponens cites the conciliar description of marriage as an "intima communitas vitae et amoris conjugalis"; but at the same time he uses the terms "vitae consortium", "communis vitae consuetudo", and "vitae communio" to designate only (non-essential) cohabitation.<sup>5</sup> In a decision written less than two months later, however (July 2, 1968), Fagiolo discusses the question of the ends of marriage as presented in Gaudium et Spes and offers an interpretation, not only of the conciliar document's treatment of the matter, but also of earlier ecclesiastical statements. Gaudium et Spes, says Fagiolo, while propounding some new ideas (quaedam nova proponens), deliberately avoided the problem of an order among the ends of marriage. In fact, he states (citing canon 1013 #1, Casti Connubii, and the 1944 Decree of the Holy Office), the prior teaching of the Church on the

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<sup>4</sup> Decision coram Fiore, November 30, 1968, in R.D.C., 19(1969), pp. 198-199.

<sup>5</sup> Decision coram Fagiolo, May 18, 1968, in I.D.E., 80-2(1969), pp. 160-164.

hierarchy of ends seems to have had as its chief purposes to affirm that procreation is part of the very nature of marriage and to dispel any errors on this point. But, he states, it is the task of theology and canon law, rather than of the Magisterium, to investigate the more technical aspects of the question of matrimonial finality: thus the silence of the Pastoral Constitution. The Ponens mentions also the teaching of St. Thomas and St. Bonaventure to the effect that, although procreation is not the entirety of marriage, the right to carnal copula for procreation is necessary for a valid union. In short, what Fagiolo has done in this decision is to assert the importance of the procreative finality of marriage while implying that the question of the "equal principality" of other ends is still open.<sup>6</sup>

2. The Beginnings of a Jurisprudence  
on the Consortium Omnis Vitae: 1969-1972.

a) Acceptance of the Notion.

i - coram Anné, 1969 to 1972:- In five decisions written between 1969 and 1972 the Rotal Auditor Lucien Anné inaugurated what soon developed into a widespread discussion (among canonists, if not within the Rota itself) on the canonical import of the idea of the consortium vitae. In a

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<sup>6</sup> Decision coram Fagiolo, July 2, 1968, in E.I.C., 24(1968), pp. 174-178.

celebrated sentence of February 25, 1969, dealing with a case of alleged homosexuality, Anné attributed juridical significance to the description by Gaudium et Spes of marriage as an intima communitas vitae et amoris coniugalis.<sup>7</sup> The identification by canon 1081 #2 of the Code of Canon Law of the formal substantial object of consent as the ius in corpus, perpetuum et exclusivum, said the Ponens, points only to what is "most specifying" in canonical marriage; but it does not take in the entirety of matrimonium in fieri, especially when the ius in corpus is seen only in a biological perspective. The canon must be completed by the teaching of Gaudium et Spes.

This formulation of Vatican Council II ["Intima communitas vitae et amoris coniugalis ... instauratur ... actu humano quo coniuges sese mutuo tradunt et accipiunt."] has juridical significance. For it looks, not to the mere fact of inaugurating a community of life, but to the right and obligation to this intimate community of life, which has as its most specific element an intimate union of persons by which man and woman become one flesh, a union to which, as its summit, that community of life tends. This points out that marriage is a most personal relationship and that matrimonial consent is an

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<sup>7</sup> Decision coram Anné, February 25, 1969, in E.I.C., 26(1970), pp. 419-442.

act of the will whereby the spouses "mutually hand over and receive each other" [...].<sup>8</sup>

Anné continues by observing that in theological and canonical tradition marriage has been called a consortium vitae and an individua consuetudo vitae. These expressions designate, of course, matrimonium in facto esse, which, in its essential elements, is the "formal substantial object" of consent and must therefore be intended - at least implicitly and indirectly (implicite et mediate) - at the time of entering marriage. Certainly, says Anné, there can be lacking in marriage the "community of life"; but the right to a community of life can never be absent.<sup>9</sup>

The Ponens makes it clear that this notion of "communitas vitae" is not exhausted by cohabitation or by the merely "integrating" and non-essential elements of married life. He then formulates what he says is a more accurate definition of matrimonial consent. It is:

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8 Ibid., p. 429: "Propositio haec Concilii sensum iuridicum habet. Non respicit, enim, merum factum instaurationis communitatis vitae, sed ius et obligationem in hanc intimam communitatem vitae, quae uti elementum maxime specificum habet intimam personarum coniunctionem qua vir et mulier fiunt una caro, ad quam uti culmen tendit illa vitae communitas. Id denotat matrimonium esse relationem maxime personalem consensumque matrimonialem esse actum voluntatis quo coniuges 'sese mutuo tradunt atque accipiunt' [...]." Stress is in the original.

• 9 Ibid., pp. 429-430.

an act of the will whereby a man and woman establish, by a mutual pledge or irrevocable consent, a consortium vitae coniugalis which is perpetual and exclusive and which of its very nature is ordered to the generation and education of offspring.

Thus the formal substantial object of this consent is not only the ius in corpus, perpetual and exclusive, ordered to acts naturally suitable for the generation of offspring, to the exclusion of any other formal essential element; rather, it comprises also the ius ad vitae consortium seu communitatem vitae which is properly considered matrimonial; and [it comprises] likewise corresponding obligations, that is, the ius ad "intimam personarum atque operum coniunctionem" by which [the spouses] "perfect each other in order to collaborate with God in the procreation and education of new lives" (Enc. "Humanae Vitae").<sup>10</sup>

Anné continues his statements in iure by admitting the difficulty of exhaustively listing the essential juridical elements of the consortium vitae; and he remarks that three

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<sup>10</sup> Ibid., pp. 430-431: "Rectius, igitur, consensus matrimonialis definitur: actus voluntatis quo vir et mulier foedere inter se seu irrevocabili consensu constituunt consortium vitae coniugalis, perpetuum et exclusivum, indole sua naturali ad prolem generandam et educandam ordinatum.

"Obiectum, exinde, formale substantiale istius consensus est non tantum ius in corpus, perpetuum et exclusivum, in ordine ad actus per se aptos ad prolis generationem, excluso omni alio elemento formali essentiali, sed complectitur etiam ius ad vitae consortium seu communitatem vitae quae proprie dicitur matrimonialis, necnon correlativas obligationes, seu ius ad 'intimam personarum atque operum coniunctionem', qua 'se invicem perficiunt ut ad novorum viventium procreationem et educationem cum Deo operam sociant' (Enc. "Humanae Vitae")."

The definition of consent given here is practically identical with that of canon 295 #2 of the 1975 Schema...de sacramentis. Msgr. Anné has been from the beginning a member of the coetus for the revision of matrimonial law.

aspects of marriage have always to be kept in mind: the natural-law element, the cultural aspect, and the personal dimension as this exists for the spouses themselves (campus existentialis). It is this last area, Anné says, which offers the most promise to the ecclesiastical judge, since he deals always with individual cases; and therefore an examination of the personal condition of the parties involved becomes the usual method of investigation and proof when there is question of the absence of the essential object of matrimonial consent. Apart from instances of mental deficiency which substantially impairs the very giving of consent, there are but two types of psychic abnormality, asserts Anné, which fundamentally prevent the person from establishing the communitas vitae coniugalis: (a) a very serious distortion of the sexual instinct (as can sometimes happen in the case of homosexuality); and (b) a paranoiac disordering of the affectivity - or their equivalents. The Rotal Auditor concludes with a warning lest the juridical principles he has enunciated be "imprudently" or too loosely interpreted.<sup>11</sup>

As can be seen, this decision written by Anné was a most significant jurisprudential statement. Basing its argumentation not only on Gaudium et Spes (and even to some

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<sup>11</sup> Ibid., pp. 431-433.

extent on Humanae Vitae), but more fundamentally on the very nature of marriage as a divinely-established institution, the Rotal sentence was genuinely "groundbreaking" in giving unambiguous juridical value to the concept of marriage as a consortium omnis vitae. The consortium, said Anné, underlines chiefly the personal element of marriage (relatio maxime personalis), but it includes its (essential) ordering to procreation as well. At the same time the decision is careful to point out limitations to the juridical consideration of the consortium. Not all its components are essential ones; it is most difficult to enumerate the elements which are essential (and Anné does not attempt to do so); and for practical purposes only certain serious mental abnormalities can be judged to induce nullity by reason of lack of capacity to give the ius ad communitatem vitae.<sup>12</sup>

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<sup>12</sup> This Rotal decision coram Anné occasioned a widely-cited article (originally a sentence for the Montreal Appeal Tribunal) by the Canadian canonist G. Lesage, "The Consortium vitae conjugalis: nature and applications", in Studia Canonica, 6(1972), pp. 99-113. In it the author proposed a list of fifteen "concrete elements which are essential to a consortium vitae conjugalis". He explained: "If one of the spouses, then, were radically unable to meet these requirements for establishing a community of conjugal life in a satisfactory way, he would deprive his partner of an essential right of Christian marriage."

Elsewhere Lesage has refined this list of fifteen elements into five major categories, each with sub-headings or examples: (1) the balance and maturity required for a genuinely human form of conduct; (2) the relationship of interpersonal and heterosexual friendship; (3) the aptitude

In subsequent decisions given between the years 1969 and 1972, Anné reaffirmed his position on the consortium vitae, but without developing it much further. In a sentence of July 22, 1969,<sup>13</sup> the Rotal Auditor stressed again the "interpersonal" character of marriage and the need, in cases of alleged nullity, for investigation of the parties' psychic health:

Conjugal life, that is, marriage in facto esse, is lived out most particularly in interpersonal communication, underlying which, for both parties, is a healthy interpersonal orientation (sana ordinatio interpersonalis). And so if the life-history of the one who marries is judged by experts to indicate clearly that even before the marriage he seriously lacked intrapersonal and interpersonal integration (graviter deficere integrationem intrapersonalem et interpersonalem), then that person should be deemed incapable of understanding adequately the very nature of the communion of life which is ordered to the procreation and education of offspring - that is, marriage [...].<sup>14</sup>

Anné also remarks that a person may be capable of dealing with other aspects of life without thereby being able to form

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12 (cont'd) for adequate collaboration with respect to conjugal assistance; (4) the mental equilibrium and sense of responsibility required for the material well-being of the family; (5) the psychological capacity of each partner in his or her own normal way to see to the well-being of children. See G. Lesage, "Evolution récente de la jurisprudence matrimoniale", in *Société Canadienne de Théologie, Le Divorce*, pp. 47-48.

13 Ius Canonicum, 15, No. 29(1975), pp. 287-292.

14 Ibid., p. 287.

interpersonal relationships. And in three decisions following this one the Rotal Auditor repeated briefly his observations on the juridical value of the consortium vitae and the importance of the interpersonal dimension of marriage, while applying his principles to cases of mental disturbance, such as paranoiac disorders.<sup>15</sup>

ii - coram Pompedda and Fagiolo, 1969 to 1970:-

Although, as far as can be determined from published sources, Anné was the earliest and most insistent Rotal exponent of the juridical import of marriage as a consortium omnis vitae, there were indications that other Auditors as well were inclined to give consideration to the personal dimension of marriage. Mario Pompedda, in a decision in a case of intention contra bonum prolis, December 22, 1969, remarked on the place of the "secondary ends" of marriage in canonical teaching and affirmed that they are likewise essential ends, not to be ignored.<sup>16</sup> Nor can the canonical understanding of matrimonial consent, he said, be restricted to its biological

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<sup>15</sup> Decisions coram Anné: January 26, 1971, in I.D.E., 83(1972), pp. 3-7; March 30, 1971, in I.D.E., 83(1972), pp. 7-11; October 26, 1972, in E.I.C., 29(1973), pp. 109-117.

<sup>16</sup> Decision coram Pompedda, December 22, 1969, in M. Pompedda, Quaedam decisiones rotales circa metum et simulationem coram R.P.D. Mario F. Pompedda (1969-1972), Roma, Pontificia Universitas Gregoriana, 1972, pp. 165-186.

aspect: conjugal love is also important and is itself procreative. The two ends of marriage, procreation and marital love, must not be artificially separated (Gaudium et Spes and the "Dutch Catechism" are cited); thus, writes Pompedda:

It is clear that matrimonial consent leads not simply to the giving and receiving of a ius in corpus; but it is this factor which stands out as a necessary consequence, one which is juridically measureable - that is, before society - of the intimate communion, spiritual as well as physical, which was intended by the spouses when they gave their consent.<sup>17</sup>

Pompedda did not elaborate on this "intimate communion", nor did it figure directly in the outcome of the case. But he apparently wished to point out that the bonum prolis and the bonum coniugum are both part of the natural structure of marriage.

A decision given October 30, 1970, by Fagiolo has been remarked upon by a number of commentators because of the juridical weight it gives to conjugal love as in some

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<sup>17</sup> Ibid., pp. 171-172: "Patet igitur consensum matrimonialem inducere haud meram iuris in corpus traditionem, et respective acceptationem, sed hanc exstare consecretarium necessarium ac iuridice aestimabile, nempe in externa societate, intimae communionis, tum spiritualis cum physicae, a coniugibus intentae in praestando consensu."

way necessary for the eliciting of valid consent.<sup>18</sup> But Fagiolo in this sentence is concerned not only with a juridico-psychological analysis of love, but also with the essence of marriage (whence he draws his arguments regarding love itself):

In order that matrimonial consent attain its object, the person must know and will the consortium of life, i.e. the community of life, between a man and a woman in accord [with] the essence peculiar to its institution. This consortium supposes a mutual giving of a man and a woman. This giving is done by a true and authentic and unfaked consent, and in this is conjugal love.

If, with St. Thomas (Summa Theol., q. XLV, art. II [sic]) and Vatican II, in Gaudium et Spes, nn. 48, 49, we say that matrimonial consent is the act of the will by which each party willingly consents to give and receive each other in a community of life which by its very nature is ordered to the procreation and education of children, then it is not difficult for us to have a more profound knowledge of marriage questions and in making laws to follow it, a knowledge which admits that conjugal love is an element proper to marriage, and has force and effect both in its efficient cause and in its formal cause,

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<sup>18</sup> This unpublished decision (Prot. No. 9694) is available to the author only in its English translation by J. McEnerney, S.J., for the Canon Law Society of America ("Translation #8").

For a commentary on the place of love in recent Rotal jurisprudence see C. Murtagh, "The Juridical Importance of 'Amor Conjugal'", in Studia Canonica, 7(1973), pp. 49-57; W. Ladue, "Conjugal Love and the Juridical Structure of Christian Marriage", in The Jurist, 34(1974), pp. 36-67; and C. Lefebvre, "Actes récents du Saint-Siège", in L'Année canonique, 18(1974), p. 307.

that it is the truth and the authenticity of the consent, and the integrity of the object of consent.<sup>19</sup>

And in a brief passage in a later decision, November 27, 1970, Fagiolo reiterates his belief that the consortium vitae is included within the juridical object of consent. He says that "matrimonial consent looks not only to 'acts which are naturally suitable for the generation of offspring', but the total object of marriage (unity, indissolubility, the intimate community of life, etc.)".<sup>20</sup>

b) Early Opposition.

There is little published evidence of a clear opposition to the notion of the consortium vitae in the years 1969 to 1972. In Rotal decisions coram Pinto (July 30, 1969)<sup>21</sup> and Pallazini (June 2, 1971)<sup>22</sup> it was argued that love is not a juridical element in marriage, although little

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19 Canon Law Society of America translation, in iure, No. 7.

20 "[...] consensus matrimonialis non respicit tantum 'actus per se aptos ad prolis generationem' sed totum obiectum matrimonii (unitatem, indissolubilitatem, communionem intimam vitae, etc.)." This is from Principia iuris ex diversis decisionibus, published privately by the Gregorian University, Rome, 1971, and is quoted in Canon Law Society of Great Britain, Newsletter number 17, June, 1973, Appendix IV.

21 M.E., 96(1971), pp. 510-514.

22 I.D.E., 82(1971), pp. 397-403.

was said specifically about the communitas vitae as the object of consent. The case heard by Pallazini was the same one for which Fagiolo had written his (First Instance) sentence of October 30, 1970; and the second decision, although deciding for nullity as had the first, disagreed completely with the canonical value given to conjugal love in the earlier sentence. In a decision given December 16, 1972, coram Lefebvre<sup>23</sup> the Auditor remarked (simply in passing) that Gaudium et Spes did nothing to change the hierarchy of ends in marriage; and he cited the study of U. Navarrete, "Structura iuridica matrimonii secundum Concilium Vaticanum II".

A sentence which dealt directly, although inconclusively, with the question of the juridical significance of the ius ad communionem vitae was one given by the Apostolic Signatura, December 5, 1972.<sup>24</sup> The case, originating from Haarlem, The Netherlands, had been tried in two Instances in the Dutch tribunals and had received decisions "matrimonium non est vinculanus pro coniugibus"; but it was subsequently reviewed by the Signatura because of what seemed to the Apostolic Tribunal to be questionable principles, procedure,

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23 Periodica, 62(1973), pp. 403-412.

24 Decision coram Staffa, December 5, 1972 (Apostolic Signatura, Prot. No. 3196/72), in Periodica, 62(1973), pp. 567-580.

and grounds which were employed by the Dutch tribunals.<sup>25</sup> The sentence of the Signatura asserted that "no substantial change in the juridical structure of marriage" had been brought about by Gaudium et Spes and that the conciliar document had not attempted a juridical treatment of the object of consent. On the notion of the consortium vitae the Signatura was simply cautious. It stated that the juridical value of the communio vitae as a distinct element in marriage had not yet been demonstrated and that the question awaits further study by doctrine and jurisprudence. Certainly, said the Roman Tribunal, not all elements of the consortium belong to the object of consent.<sup>26</sup>

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<sup>25</sup> A background to the case can be seen from a letter of Cardinal Staffa, Prefect of the Apostolic Signatura, to Cardinal Alfrink, President of the Episcopal Conference of The Netherlands, December 30, 1971, in which the Dutch bishops were requested to correct certain tribunal practices. The communication has been published in a number of places, for instance, La Documentation Catholique, 69(1972), pp. 618-620 (in French); Apollinaris, 45(1973), pp. 294-298 (in Latin); Canon Law Digest, Vol. 7, pp. 706-711 (in English).

<sup>26</sup> Periodica, 62(1973), pp. 575-576, 579.

## 3. The Jurisprudential Controversy: 1973-1977.

a) Affirmations of the Consortium Omnis Vitae.

i - coram Serrano, 1973 to 1976:-, The notion of the consortium vitae was given further development in a much-discussed Rotal decision coram J.M. Serrano, April 5, 1973.<sup>27</sup> Serrano elaborated at length upon the interpersonal character of marriage, which had been previously emphasized by Anné. This interpersonal element of matrimony, says Serrano, is its most distinctive trait (peculiarissima indoles); and it is for this reason that marriage defies too close a comparison with other moral and juridical matters. A spouse must not only be able to give "marriage rights" to the other; he must be equally capable of receiving from the other those rights. Yet, since marriage is a relationship sui generis, involving such personal factors, there is a sense in which the "marriage rights" can be identified as being the persons of the spouses themselves. The matrimonial rights and obligations

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<sup>27</sup> R.E.D.C., 34(1974), pp. 107-128. It has also appeared elsewhere. For a commentary on the decision see W. Schumacher, "Interpersonal Communication in Marriage. A Commentary on the Rotal Decision of April 5, 1973, coram Serrano", in Studia Canonica, 9(1975), pp. 5-35; M. Lavin, "The Rotal Decision before Serrano, April 5, 1973: Some Observations concerning Jurisprudence, Procedure, and Risk", in The Jurist, 36(1976), pp. 302-316; also G. Robinson, "Capacity for interpersonal relations", in Studia Canonica, 11(1977), pp. 415-419 (extract of a matrimonial decision).

are not, in any event, to be conceived of as "disembodied" ones; "it must at least be maintained that matrimonial consent is given by persons insofar as these persons are themselves not completely distinct from the rights and obligations which are given and received".<sup>28</sup>

In arguing his case Serrano points to Gaudium et Spes, Humanae Vitae, and the decisions of Anné of February 25, 1969 (Serrano approves of Anné's assertion that the right to the consortium vitae must be present in a valid marriage), and July 22, 1969 (where Anné says that a serious deficiency in "intrapersonal and interpersonal integration" can nullify consent). Serrano's conclusion is that

While it must be concluded that an "interpersonal" relationship can reach greater or lesser perfection for different spouses, it is in no way admissible to claim that it belongs entirely to the "more perfect" or the "desireable" ideal marriage, because, as has been said, it constitutes an "essential property" of each and every marriage "in fieri". If [this relationship] is totally lacking, the marriage itself is non-existent.<sup>29</sup>

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<sup>28</sup> R.E.D.C., 34(1974), p. 109: "[...] saltem tenendum [est] ipsasmet personas prout inadequate distinguuntur a iuribus et officiis, quorum fit traditio et acceptatio, consensum matrimonialem ingredi."

<sup>29</sup> Ibid., p. 112: "Cum ultro concedatur relationem 'interpersonalem' maiorem vel minorem posse apud diversos nupturientes perfectionem attingere; nequaquam tamen licebit asserere eam ad 'perfectius' vel 'optabile' matrimonium ideale totam pertinere, cum 'proprietaem essentialem' cuiuscumque matrimonii 'in fieri', iuxta dicta, constituat: qua penitus deficiente, et ipsum matrimonium corrui."

Serrano, like Anné before him, has some cautionary remarks regarding the possible temptation to declare marriages invalid because of a breakdown in marital happiness and communication. There must be a true psychological defect, and it must be truly incapacitating. Serrano also requires the assistance of expert opinion in the investigation of the psychic disorders which may account for the inability to form personal relationships. He does state, however, that the invalidating disability need not always merit the strict classification of "illness" (morbus); and he asserts that if such an incapacity is proved to exist, it is irrelevant whether it would render the person unable to enter any marriage at all; it is sufficient to establish that he is genuinely incapable of the one marriage at issue.<sup>30</sup>

In subsequent decisions coram Serrano, April 30, 1974,<sup>31</sup> and July 9, 1976,<sup>32</sup> the Ponens chiefly re-asserts the notion of "interpersonality" which he explored in the earlier sentence. In the first of these later decisions, an apparent case of hyperaesthesia and homosexuality, Serrano states that the interpersonal relationship which is marriage demands that the parties be capable of engaging in conjugal

<sup>30</sup> Ibid., pp. 116, 124.

<sup>31</sup> E.I.C., 31(1975), pp. 191-202.

<sup>32</sup> M.E., 102(1977), pp. 363-381.

sexual relations in a manner that is "worthy of human dignity". He bases this in part on the statement of Gaudium et Spes, No. 49: "Thus the acts by which the spouses are intimately and chastely united to each other are honorable and worthy; and as long as they are performed in a genuinely human way, they signify and foster the mutual self-giving whereby the spouses enrich each other in joyful gratitude." Nor, says Serrano, should it be too quickly asserted that this passage speaks only of an ethical or moral ideal; while there can be, and frequently are, failures in this area of married life, there must always exist within the parties the fundamental capacity for responsible and "human" conjugal sexual activity.<sup>33</sup>

In his 1976 decision Serrano explicitly equates the communitas vitae with relatio interpersonalis and reiterates his stress of the fact that marital rights and duties are essentially "other-oriented". In assessing the capability of persons to assume marital obligations, says the Rotal Auditor, the ecclesiastical judge cannot be content to investigate the psychological condition of each party alone; but the spouses' common venture, their marriage, is the point at issue; and therefore the capability of each person with regard to the other should be examined. Such a capacity for

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33 E.I.C., 31(1975), pp. 201-202.

a marital relationship presupposes the development of an adult personality.<sup>34</sup>

In these three decisions written by Serrano, the Ponens, then, has clearly accepted the consortium omnis vitae as a juridical element of marriage, as this idea was propounded in the Rota by Lucien Anné. In his insistence upon the interpersonal character of marriage, Serrano has stressed even more emphatically than Anné the personal dimension of the consortium, and has explicitly extended the notion of "interpersonality" to sexual relations themselves (although by no means limiting it to this). He has expressed the opinion that it is often less profitable to concentrate on the objective iura matrimonii than on the subjective condition of the parties themselves, specifically with respect to each other. At the same time Serrano has emphasized that only a serious and truly incapacitating psychic defect (regardless of how it might be medically classified) can radically prevent one from assuming the obligations of the consortium vitae.

ii - coram Anné, 1973 to 1975:- In a decision before Anné of February 6, 1973, in which one of the parties was diagnosed as being homosexual and to some extent ambisexual, the Ponens stressed that the consortium vitae must be a

34 M.E., 102(1977), pp. 365-366, 369-371.

heterosexual union, requiring of those who enter marriage not only the physical ability to engage in sexual relations with the partner, but also an affective sexual orientation to the other person precisely insofar as that person is a member of the other sex. Of course, said the Auditor, all that can be considered for the validity of marriage is a minimum quid in this respect (since a number of people possess some homosexual tendencies); but a fundamental inability in this area of heterosexual affectivity marks the person as incapable of valid marriage.<sup>35</sup>

A sentence written by the same Auditor, March 11, 1975,<sup>36</sup> is of interest not because the notion of the consortium received development, but because there was no proved inability to assume the obligations of marriage; nor was it shown that the bona matrimonii (specifically the bonum sacramenti) had been excluded by a positive act of the will. It was instead judged that the Defendant was of such "amoral, egotistic, and hedonistic" character that he looked upon marriage as something resembling concubinage. There was a sense in which the Defendant "positively excluded" marriage

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<sup>35</sup> Decision coram Anné, February 6, 1973, in I.D.E., 85-2(1974), pp. 3-7.

<sup>36</sup> Decision coram Anné, March 11, 1975, unpublished, Prot. No. 10.629. An English translation can be found in Canon Law Digest, Supplement, 1975, pp. 47-61.

as understood by the Church and likewise a sense in which he "lacked due discretion" for consenting to such a marriage, all because of the type of person he was (morally and ethically).<sup>37</sup> So, while Anné did not attempt to apply his arguments to marriage considered explicitly as a consortium vitae (it was perhaps not thought necessary to do so), such an application would appear to be quite justified: the ius ad communionem vitae can be absent not only by reason of a severe psychological abnormality, but also because of voluntary exclusion.

In another decision, given December 4, 1975, Anné takes the occasion to re-affirm strongly the nature of marriage as a consortium omnis vitae and cites recent canonical studies which confirm the notion.<sup>38</sup> It is not a matter, says the Ponens, of simply the ius condendum: the consortium

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37 In facto, No. 22: "Haec quidem rerum personarumque adiuncta, si seiunctim considerantur, vi concludentis probationis carent, atvero SI IN CORRELATIVA COMPLEXIONE PERPENDUNTUR, praesertim ea quae spectant ipsam vitam conjugalem, quam duxerat, valide demonstrant in viro convento, ob suam amoralitatem, extremum egoismum et summum hedonismum, graviter defuisse discretio iudicii circa jura et officia matrimonialia MUTUO TRADENDA ET ACCEPTANDA. Exclusive propria commoda quaerebat, omnia iura et officia pro nihilo habens, atque positivo voluntatis actu tantum quoddam cum muliere contubernium intendens, uti perspicue demonstratur ex ratione vitae quam ducebat inde ab initio vitae conjugalis, uti supra explicatum est." Stress is in the original.

38 Decision coram Anné, December 4, 1975, in E.I.C., 33(1977), pp. 169-184.

describes what is of the very essence of matrimony. Anné notes, among other statements, the Address of Pope Paul VI to the Rota (February 9, 1976), previous decisions given by him and Serrano, and observations made by Lener, Robleda, and Navarrete, as well as Scriptural studies. He cites at length especially U. Navarrete to the effect that the ius ad vitae communionem is an essential matrimonial right distinct from all other rights of marriage (and separate from the three bona), distinct likewise from the sum of essential matrimonial rights. Anné makes it clear that for him the consortium omnis vitae is to be identified with the "interpersonal conjugal relationship", explaining the latter in this fashion:

At the core of this interpersonal conjugal relationship inherent in the heterosexuality of human beings - marriage in facto esse - is the state of mind of husband and wife, by which the spouses, despite human frailty and the grave, even very grave faults of one or the other, constantly strive, in their concrete circumstances, to bring into effect "that undefined and indefinable sum of attitudes, of behaviour and of actions - varying in its concrete expressions in different cultures - without which it would be impossible to bring into being and keep in being that communion of life ... which is necessary for the achievement, in a truly human way, of the ends which marriage is destined to achieve.<sup>39</sup>

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<sup>39</sup> Ibid., pp. 176-177: "Huius hominum heterosexualitati inhaerentis interpersonalis relationis coniugalis, quod est matrimonium in facto esse, natura - in suo nucleo fundamentalis perspecta - est mutua mariti uxorisque mentis conditio, qua coniuges, cum fragilitate quidem humana et haud obstantibus

Anné adverts to the previous observation in his sentence of February 25, 1969, that it is most difficult to define accurately and completely which elements of the consortium are juridically essential; and he repeats that it is the via negativa which is the normal route of judicial investigation - that is, the confirmation of the psychological deficiency of the person(s) involved. He does imply, however, that simulation, as well as psychic aberration, can account for the absence of the ius ad communionem vitae.<sup>40</sup>

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39 (cont'd) nonnumquam gravibus, immo gravissimis, alterutrius vel utriusque culpis, constanter nituntur - in ordine existentiali - ad effectum adducendi 'quell'insieme indefinito e indefinibile di atteggiamenti, di comportamenti e di attività - variabile nelle sue espressioni concrete a seconda della diversità di culture - senza il quale è impossibile la formazione e conservazione di quella comunione di vita ... necessaria per il raggiungimento, in modo veramente umano, delle finalità proprie del matrimonio'."  
Stress is in the original.

The English translation here is that provided by members of the Tribunal of Sydney, Australia. The quotation by Anné is of U. Navarrete, "Problemi sull'autonomia dei capi di nullità del matrimonio per difetto di consenso causato da perturbazioni della personalità", in Perturbazioni psichiche e consenso matrimoniale nel diritto canonico, (Studia et documenta juris canonici, t. VII), Romae, 1976, p. 135.

<sup>40</sup> E.I.C., 33(1977), p. 177. Anné also discusses in this sentence the juridical value of love in the act of matrimonial consent. He says that the judges of the turnus consider the question to be principally one of terminology (what exactly is meant by "love"?) and think it advisable to avoid using the word in a juridical context. Ibid., pp. 178-184.

iii - Other Rotal Decisions:- In a lengthy (eighty-one typewritten pages) unpublished sentence of April 14, 1975, the Rotal Auditor Ignace Raad upholds the juridical value of the consortium vitae.<sup>41</sup> Citing Gaudium et Spes, Humanæ Vitæ, and the proposed law as it appeared in the periodical Communicationes, Raad acknowledges that the personal dimension of marriage is indeed part of the essential object of consent. Nor, he says, is this a matter only of the ius condendum; it is a question of "the very nature of marriage, which belongs more to the province of theology than to canon law". Raad cites approvingly Anné's sentences of February 25 and July 22, 1969; and he states that just as a valid marriage presupposes the capacity to engage in conjugal sexual acts in a manner which is free of "serious perversions", so the capacity to live a consortium vitae means that conjugal life is capable of being lived out in a "human fashion".

While affirming the juridical relevance of the ius ad communionem vitae, Raad is highly critical of some United States and Canadian jurisprudence, and particularly of the elements of the consortium vitae which have been proposed in

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<sup>41</sup> Protocol No.10.832.

various circles.<sup>42</sup> It is not possible, he says, to determine which components of the consortium are necessary ones; instead, one can approach the matter only by investigation of the person himself. If the personalities of the spouses are basically healthy, there is no question of incapacity to exchange matrimonial rights; only when a very serious psychic defect is shown to exist can a marriage be declared invalid by reason of a fundamental inability to tender and receive the ius ad consortium vitae.

The Rotal Judge Angelo Di Felice indicates, in three sentences written in 1975 and 1976,<sup>43</sup> that he too accepts the ius ad communionem vitae conjugalis as an element of the object of consent, alongside the ius in corpus of canon 1081 #2. He acknowledges Anné's assertion that the teaching of Gaudium et Spes on the consortium has juridical significance; and he refers to Serrano's analysis of the interpersonal relationship within marriage. Di Felice does not seem to

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<sup>42</sup> See above, p. 196, note 12. With respect to Lesage's proposal Raad questions (in iure, No. 15), "Si omnia et singula relata elementa consensui matrimoniali essentialia sunt, legitime quaeritur: Quisnam est matrimonii capax? Estne infelix matrimonium quod invalidum declarari nequit?" The Rotal Auditor refers here to the original listing of fifteen elements, not to the later division of five major categories.

<sup>43</sup> Decisions coram Di Felice, March 8, 1975, in E.I.C., 31(1975), pp. 176-180, and M.E., 101(1976), pp. 85-91 (where the date of the sentence is incorrectly identified as 1973); December 11, 1975, in E.I.C., 32(1976), pp. 279-280; January 17, 1976, in E.I.C., 32(1976), pp. 284-285.

advance further the understanding of the communio vitae, however, and deals with the notion chiefly in relation to lack of discretion and psychological incapacity.

Likewise, in a sentence of January 31, 1976,<sup>44</sup> Charles Lefebvre acknowledges that the right to a "consortium totius vitae" is given and received at the time of marriage consent, citing Anné and Gaudium et Spes. Lefebvre seems to look upon the ius ad consortium vitae not as a single and specific matrimonial right, but as a more inclusive one:

[This right] is indeed not something independent of the right to the conjugal act together with its essential properties, but more correctly signifies or indicates all of these, looking at those elements which make up that right, namely the ordering to offspring, perpetuity, and exclusivity.<sup>45</sup>

Lefebvre apparently does not want to exaggerate the difference between the juridical understanding of marriage before and after Gaudium et Spes; but he continues in this sentence by pointing out the "interpersonality" of the marriage relationship, stating that it is insufficient for jurisprudence to investigate the psychological condition of

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<sup>44</sup> E.I.C., 32(1976), pp. 285-287. It has appeared elsewhere also.

<sup>45</sup> E.I.C., 32(1976), p. 286: "Profecto non est quid independens a iure ad conjugalem actum cum eius essentialibus proprietatibus, sed rectius significat seu denotat ista omnia ratione habita eorum quae illud complectantur sc. ordinationis ad prolem, perpetuitatis et exclusivitatis."

one partner alone and independently, without reference to marriage's fundamental determination ad alterum.

Heinrich Ewers is yet another Rotal Auditor to attribute canonical value to the notion of the consortium omnis vitae. In a decision of January 15, 1977,<sup>46</sup> Ewers describes the object of matrimonial consent as the "vitae communicatio una cum matrimonii ipsius bonis". He says that it may be questioned whether or not the "communicatio" actually includes something over and above the sum of the three bona from a technical standpoint; but he understands this "communicatio" to refer to the personal aspect of marriage and its "relatio interpersonalis". He states furthermore that the right to the consortium vitae can be excluded from consent - and thus nullify marriage - in four ways: (a) by total simulation, (b) by a positive act of the will; (c) by intending a "communicatio" which is substantially different from "conjugal life"; and (d) by reason of a radical incapacity to establish the matrimonial "interpersonal relationship".<sup>47</sup>

b) Denials of the Juridical Relevance of the Consortium.

i - coram Pinto, 1973 to 1976:- The concept of the consortium omnis vitae has not had unanimous acceptance in

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<sup>46</sup> E.I.C., 33(1977), pp. 354-356.

<sup>47</sup> Ibid., pp. 355-356.

the Roman tribunals. By far the most visible opponent of the canonical value of the consortium - to judge from published sentences - is the Rotal Auditor José Pinto. A sentence written by him November 12, 1973, addresses itself to the question directly and in doing so constitutes a concise but rather complete presentation of the entire matter from the more "traditional" viewpoint.<sup>48</sup>

The hierarchy of matrimonial ends as stated in canon 1013 #1 of the Code has been re-affirmed and developed, notes Pinto, by Casti Connubii, the 1944 Decree of the Holy Office, and the teaching of Pope Pius XII. And the formulation of canon 1081 #2, that the ius in corpus is the essential formal object of consent, is the accepted canonical doctrine, as witnessed by the major commentators of the Code of Canon Law, as well as by the Wynen decision, January 22, 1944. The same authors almost unanimously affirm that conjugal life in common, with the personal benefits which normally accompany it, belong to the "integrity" of canonical marriage, not to its essence. Although there are some who now assert that this teaching should be revised in the light of Vatican Council II (and Pinto also notes the early proposals in Communicationes), there is no justification for

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<sup>48</sup> Decision coram Pinto, November 12, 1973, in Periodica, 64(1975), pp. 503-517.

such a view. Pinto points out two major reasons for his own position. First, Gaudium et Spes did not intend to invert or do away with the hierarchy of the ends of marriage (and responses of the conciliar commission in the Expensio Modorum of the document are cited). Secondly, the Auditor says, the difficulty of distinguishing the (allegedly essential) communio vitae from those elements of marriage which are merely "perfecting" of conjugal life is too formidable. He points to the study of G. Lesage as an example of the profound consequences which a major change in the understanding of the juridical structure of marriage would entail.<sup>49</sup>

A second decision coram Pinto, April 14, 1975, invites comment not because of its explicit rejection of the concept of consortium vitae, but because of the failure to consider it seriously.<sup>50</sup> The case concerned a man who was shown to be a transsexual and a transvestite, although three children had been born of the union. The judges held for the validity of the marriage, principally because it was not proved that the husband was incapable of giving and implementing the ius in corpus, perpetuum et exclusivum. Although it was accepted that the man indeed suffered from

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<sup>49</sup> Ibid., pp. 504-509.

<sup>50</sup> Decision coram Pinto, April 14, 1975, in M.E., 102(1977), pp. 39-48. It has been published elsewhere also.

an aberration of the sexual instinct, the sentence as written did not attempt to explore earnestly the consequences of such a condition for the couple's affective and emotional life.

The argumentation is summed up in the following passage.

From what has been said it is clear that the marriage of transsexuals, even though they be on occasion capable of complete sexual relations, would be invalid if it were proved that at the time of entering marriage they were unable to give and receive the right to the body in perpetuum.

The fulfillment of [this] duty is not impeded by the fact that the man must imagine himself to be a woman [in order to have sexual intercourse], or vice versa, just as the use of aphrodisiacs does not impede the consummation of a marriage (Holy Office, February 2, 1949).<sup>51</sup>

And the Ponens further states:

There is no objection [to our argument] from the fact that the expert Cote admits that it was impossible for the Defendant "to fulfill the duties of marriage in a healthy way and to establish a community of life and love". For first of all [the same expert] states: "It is not juridical freedom which is at issue here, but the aptitude to effect a happy marriage"; but this does not belong to the essence of marriage, however desirable it may be.<sup>52</sup>

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<sup>51</sup> M.E., 102(1977), p. 45: "Ex dictis patet matrimonium transexualium, etiam in casibus copulae coniugalis perfectae capaces sunt, irritum esse ubi comprobetur tempore celebrationis nuptiarum incapaces fuisse tradendi et acceptandi ius in corpus in perpetuum.

"Officio adimplendo non obstat quod vir feminam sentire debeat, aut viceversa, sicut non obstant aphrodisiaca consummationi matrimonii (S.S.C.S. Off., 2 februarii 1949)."

<sup>52</sup> Ibid., p. 47: "Non obstat quod peritus Cote admittat convento impossibile fuisse 'le sain accomplissement

In another decision, given October 28, 1976, the same Auditor explicitly rejects the idea that the consortium vitae is an essential element of marriage.<sup>53</sup> Dealing in iure with the caput of incapacity to fulfill matrimonial obligations, Pinto affirms that the primary end of marriage is procreation and that marriage is specified by the ius in

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52 (cont'd) des devoirs du mariage et la constitution d'une communauté de vie et d'amour'. Imprimis enim ipse iam dixerat: 'Ce n'est pas la liberté juridique qui est en cause mais l'aptitude à réaliser un mariage heureux', quod quidem ad essentiam coniugii non pertinet quantumvis exoptabile sit." Stress is in the original.

It is admittedly less than satisfying (and sometimes unjust) to try to determine an author's thought from only negative indications, that is, from what he did not say. Furthermore, this sentence coram Pinto includes a rather serious analysis of the phenomena of transvestitism and transsexuality; and the judges, considering all the evidence, obviously did not think the man's condition was serious enough to warrant a decision of nullity. Other judges, if they had examined the case from a different viewpoint and relying on different legal principles, may well have arrived at the same conclusion. Nevertheless the decision is noteworthy, it seems, inasmuch as it is the perpetual right to the ius in corpus which is its controlling argument in iure, and not, for instance, the emotional repercussions which the husband's psychological abnormality may have had upon the marital relationship - although this is briefly touched upon - and especially the husband's ability to have a truly heterosexual-conjugal association with his wife. It is related in the decision that the man could often have sexual relations only when he dressed in women's clothing and imagined himself to be a woman. One wonders whether this would fulfill the minimum requirements of a sexual life to be engaged in "in a human and worthy manner" as some Rotal sentences have stated.

<sup>53</sup> Decision coram Pinto, October 28, 1976, in E.I.C., 33 (1977), pp. 331-336.

corpus: thus one arrives at the essential onera matrimonii. "Mutual assistance", however important it may be for a happy conjugal union, is not itself an essential constituent of matrimony. "A society of love, that is, a consortium ad mutuum adiutorium, can exist between mother and son, between brother and sister." And the Ponens continues:

Although a vitae consortium makes up a generic element of marriage (see the Supplementum [of the Summa Theologiae], q. 44), the society which is specifically matrimonial takes its origin immediately from the giving and receiving of the ius in corpus; and therefore no other ius ad vitae consortium seems to be necessary.<sup>54</sup>

Pinto appears to identify this ius ad vitae consortium with cohabitation, or at least to consider the two notions to be quite similar; for he immediately mentions that the inability to exchange the right to life in common does not itself invalidate marriage.<sup>55</sup>

ii - coram Masala, March 12, 1975:- A lengthy (forty-eight typewritten pages in the original) Rotal sentence given March 12, 1975,<sup>56</sup> before Sebastiano Masala is of interest not

<sup>54</sup> Ibid., p. 335: "Quamvis vitae consortium genericum elementum matrimonii constituat (Cfr. Suppl., q. 44), ex tradito et acceptato iure in corpus societas specificae matrimonialis iam exurgit, quamobrem aliud ius ad vitae consortium requiri non videtur."

<sup>55</sup> Ibid., pp. 335-336.

<sup>56</sup> E.I.C., 32(1976), pp. 271-279. This is the decision in third instance of the case heard coram Serrano April 30, 1974 (above, p. 206).

only for its conclusion, but also for its historical presentation of the notion of consortium vitae, especially its Roman origins. The Ponens traces the Roman concept and terminology of marriage through literary examples and charts its entrance into Christian thought. But as regards its value in canon law, he states:

Therefore the intimate community of life, as has been discoursed upon above, is of the essence of marriage insofar as it denotes the mutual right to the body, with its corresponding obligation, which is ordered to acts which are themselves suitable for the generation of offspring [...].

In this sense it can be aptly said, that the "ius ad communitatem vitae" is the substantial object of the nuptial pact itself (cf. can. 1081 #2).

But the intimate community of life is considered also as that communion of board, bed, and habitation in a permanent union of wills and possessions to be strengthened through mutual love.

In this sense the communion of domestic life, according to the common teaching of canonists and theologians, belongs to the integrity rather than to the essence of marriage; and thus it is not itself the object of the matrimonial contract, but requires that the latter be already concluded.

This renders intelligible the reason why the Church sometimes allows what is called a marriage of conscience, "so that the spouses live in different houses, and no one knows they are married; but the husband has access to the wife, and she to him, as long as there is no scandal" [...].

In a marriage of this kind not only the primary end, but also other ends of marriage, can be sufficiently provided for.<sup>57</sup>

Thus, in Masala's understanding, the consortium omnis vitae, insofar as it is distinct from the ius in corpus, is simply the equivalent of cohabitation and as such is a non-essential, though desirable, element of marriage.

iii - Apostolic Signatura, coram Staffa, November 29, 1975:- A sentence dated November 29, 1975, and delivered by five Cardinals of the Apostolic Signatura has provoked considerable discussion because of its explicit denial of juridical relevance to the notion of the consortium omnis

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57 Ibid., pp. 273-274: "Intima igitur, communitas vitae, iuxta supra relata, de essentia coniugii est quatenus signat ius mutuum in corpus cum relativa obligatione, in ordine ad actus per se aptos ad prolis generationem [..].

"Hoc sensu apte dices 'ius ad communitatem vitae' obiectum esse substantiale ipsius foederis nuptialis (cfr. can. 1081 #2).

"Ast intima communitas vitae habetur quoque pro ipsa communione mensae, tori, habitationis in perseveranti unione animorum et bonorum per mutuum amorem roboranda.

"Qua significatione communio vitae domesticae, juxta communem canonistarum et theologorum doctrinam, potius ad integritatem quam ad essentiam coniugii pertinet, ideoque de se non est obiectum contractus matrimonialis, quem jam in suo esse constitutum requirit.

"Hac de causa intelligitur ratio ob quam quandoque Ecclesia permittit matrimonium quod conscientiae nuncupatur 'ita ut coniuges in distinctis domibus commorentur omnesque coniugium ignorent, sed viro pateat accessus ad mulierem et vice versa remoto scandalo' [..].

"In coniugio id genus non modo primarius sed alii fines matrimonii effici sufficienter possunt."

vitae and its direct rebuttal of several authors who would concede relevance to the consortium.<sup>58</sup> As in the earlier decision of the Signatura of December 5, 1972, the case originated in The Netherlands (Utrecht) and had been given two affirmative decisions by tribunals of that country; but the Signatura saw fit to study it anew. Similarly also to the circumstances of the earlier case, the Signatura was concerned about the unusual judicial procedures and principles of matrimonial law employed in the courts of the originating country; in this decision, however, the Roman tribunal dealt with the question of the ius ad communionem vitae at much more length and with considerably less hesitation.<sup>59</sup>

In its examination of the juridical nature of marriage, the sentence draws from a wide spectrum of theological and canonical tradition, from Augustine, the Decretals, Hostiensis, and St. Thomas to Sanchez, Schmalzgrueber, and several commentators of the Code of Canon Law. The teachings of Gaudium et Spes and Humanae Vitae are also cited, along with several contemporary canonists. The conclusions reached

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<sup>58</sup> An early text of the sentence appeared in Apollinaris, 49(1976), pp. 31-48. A revised and lengthier text was published in Periodica, 66(1977), pp. 297-325. The citations here will be from the later version.

<sup>59</sup> The historical background of both sentences is related in a commentary by M. Dooley, in Canon Law Society of Great Britain and Ireland, Newsletter number 37, June 1978, pp. 14-36.

by the Cardinals are the following:

Therefore the "communio vitae" - that is, the "individua vitae consuetudo", the "consortium omnis vitae" - belongs to the essence of marriage insofar as it is understood to be the perpetual right [...] to conjugal acts, or as a "conditio sine qua non" for the exercise of this right [...].

[...] It has not been shown that any other right belongs to the essence of the communion of conjugal life except this right to the undivided unity of sexual life. This is to say that the communion of matrimonial life properly named consists in a communion of life for bringing forth and educating offspring; genuinely conjugal acts, along with an intimate union, or vital communion, of man and wife, are by their nature, ordered to offspring; and it is by offspring that that union, communion, is made strong and continues to increase. In these acts [of conjugal sexual relations] the unitive aspect - the communio - and the procreative aspect cannot be separated. [...]

To the exchange of the ius in corpus for conjugal acts, which is the essential object of consent and the intrinsic end of the matrimonial contract, are joined other obligations and other ends [...]. These, however, which are justifiably and laudably intended by the contractants, and which are required for the happy outcome of the marital community, do not belong to its intrinsic end or essential object; they look directly to the bonum personale coniugum, not to the public [good] for which the institution of marriage is ordered; although they are closely connected with the intrinsic end of matrimony and derive from it.<sup>60</sup>

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<sup>60</sup> Periodica, 66(1977), pp. 310-311, 319: "Propterea 'communio vitae' seu 'individua vitae consuetudo' (cf. Inst. I, 9, 1), 'consortium omnis vitae' (cf. D. 23, 2, 1), ad essentiam pertinet matrimonii quatenus accipiatur ut ius perpetuum, id est non intermissum, ad actus coniugales, vel ut 'conditio sine qua non' ius ipsum exercendi non potest [...].  
[...] "Nec aliud ius ad essentiam communionis vitae coniugalis pertinere usque adhuc constat, praeter hoc ius ad

The principal arguments used by the Signatura in reaching its conclusion that the consortium vitae - except as it describes the ius in corpus or is a necessary condition for its exercise - is not part of the legal essence of marriage, seem to be three: (a) there is no justification for it, either in canonical tradition or recent Magisterial teaching; (b) it cannot be juridically distinguished from cohabitation; and (c) employment of such a notion would lead to declaring that marriage is null when it is unhappy. Even if it should be admitted in theory that some aspects of the consortium were essential - insofar as the term describes the personal dimension of marriage - these necessary components would remain, in the words of Navarrete, "undefined and

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60 (cont'd) individuum unitatem vitae sexualis: id est communio vitae matrimonialis proprie dictae in communione vitae consistit ad prolem generandum [sic] et educandum; actus vere conjugales, una cum intima unione seu vitali communione viri cum uxore, natura sua ordinantur ad prolem, qua unio seu communio illa firmatur et in dies fovetur: in his actibus adpectus unitivus - seu communio - et adpectus procreativus separari nequeunt. [..]

"Mutuae traditioni iuris in corpus ad actus conjugales, quod est obiectum essenziale consensus et finis intrinsecus contractus matrimonialis, accedunt aliae obligationes et alii fines [..]. Haec tamen, quae a contrahentibus rationabiliter ac laudabiliter intenduntur, quaeque ad felicem exitum requiruntur matrimonialis consortii, ad eiusdem finem intrinsecum seu obiectum essenziale non pertinent; bonum personale coniugum directe respiciunt, non publicum, ad quod institutum matrimonii ordinatum est; quamvis stricte cum fine coniugii intrinseco connexi sint et ex eo profluant."

indefinable".<sup>61</sup>

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As can be seen from this review of Roman jurisprudence, the notion of the consortium omnis vitae was not immediately taken up by the Rota after the Second Vatican Council, as far as can be determined from the published sentences. The first Auditor simultaneously to accept the ius ad consortium vitae as an essential canonical element of marriage and to develop it was Lucien Anné, beginning in 1969. The second major figure was J.M. Serrano, who strongly re-affirmed the opinions of Anné and carried the concept of the consortium still further in his analysis of the interpersonal character of marriage. Their thinking has found some acceptance in the Rota, in decisions written by Fagiolo, Ewers, Di Felice, Raad, and Lefebvre.

How is the consortium vitae as a juridical entity to be described? The expression refers chiefly to the personal aspect, the "interpersonal relationship" of marriage; but it includes also the orientation of marriage to procreation. It can be seen - from the Rotal decisions available - that the ius ad consortium vitae is practically identical to a ius ad mutuum adiutorium, or a right to a participation in the bonum

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<sup>61</sup> Ibid., pp. 311-312 and passim.

coniugum. It may also be looked at, perhaps, as a sum of essential matrimonial rights - a slightly different perspective - but still emphasizing the personal dimension. At the same time, however, it is certain that not all aspects of the bonum coniugum, the personal satisfactions of matrimony, can be considered essential and thus be part of the consortium as a strictly juridical element. Precisely which components of "mutual assistance" are essential and which are not, no Rotal Auditor has attempted to answer. Nor has a "list", even a tentative one, of important elements been proposed in Rotal decisions. The right to the consortium would certainly include, in the minds of those who espouse the notion, the right to engage in conjugal sexual activity which is both procreative (with respect to the actus humani) and somehow "unitive", that is to say - minimally - capable of being performed in a fundamentally human and dignified manner. It would also include the right to share an affective life which is free of grave psychic aberrations of the sort which would destroy all marital peace and emotional closeness. One example of such an aberration is deep-seated and overt

homosexuality.<sup>62</sup>

The judicial approach taken in the Rota to discerning the presence or absence of the right to the consortium vitae in a particular union has invariably been a negative one. That is, the judges have looked for an abnormal psychological condition in one or both of the parties, a condition which is genuinely incapacitating with respect to an important area of conjugal life (although according to Serrano the undesirable psychological state need not always be classified as a mental illness, medically speaking). This "negative approach" undoubtedly explains why the mental abnormalities which prevent the attainment of the consortium have received considerably more analysis than the consortium itself. It is to some extent a case of the cause being given more attention than the effect because it is less difficult to understand the former than to define precisely the latter. And, at least presently, expert medical testimony is a much surer method of proof than would be an (almost certainly

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62 An examination of the psychological conditions of the parties to the various Rotal cases studied here does not permit one to draw specific conclusions, as to the precise nature of the consortium vitae as this is understood by the judges. When the psychic deficiencies are revealed - and they frequently are not identified in the published sections of the sentences - they are of the type (hyperaesthesia, homosexuality, paranoid disorders) which would seriously affect the marital relationship in a number of ways.

controversial) attempt to designate a number of essential components of the "communion of conjugal life". Nevertheless it is admitted that psychic incapacity is not the only way in which the right to the consortium vitae can conceivably be excluded; one might also deny such a right by a positive act of the will. And the Rotal judges who maintain the juridical relevance of the consortium are clearly concerned that adequate proof be available and that the notion not be extended beyond the limits they have recognized.

This study of current jurisprudence has also shown that an opposition exists, an opposition which denies the canonical import of the consortium omnis vitae. This position is quite visible in Rotal decisions before Pinto and Masala and in the Apostolic Signatura. The reasons given for rejecting the alleged juridical value of the consortium are principally three: (a) there is no justification in canonical tradition for such a notion; the common teaching has, in fact, specifically denied it; (b) one cannot argue for the idea from the Pastoral Constitution Gaudium et Spes since that document did not have as its purpose to change the accepted teaching on marriage and, at the very least, was not primarily a juridical statement; and (c) the difficulties inherent in the very concept of the consortium omnis vitae - particularly the impossibility of identifying its essential elements and

distinguishing it from simple communio tori, mensae, et habitationis - preclude its consideration as a necessary part of canonical marriage. Over and above these arguments, the opponents of the consortium point to the abuses which easily attend such a notion.

One might justifiably wonder, then, what conclusions, if any, can be drawn from this aspect of the investigation. It is too much to say, from what can be seen so far, that there exists an established jurisprudence with respect to the consortium omnis vitae. What can be identified, certainly, are the beginnings, or the foundation, of a jurisprudence, a foundation which is already in the first stage of being elaborated and even - to some extent - refined by the depth of analysis being given to the psychological dimensions of the human personality and the interpersonal character of marriage. The outright opponents of the juridical value of the consortium seem to be a minority. And there is evidence also, as might be expected, of a hesitancy and uncertainty on the subject within the Roman courts.<sup>63</sup> As for the future, one is left with the strong

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<sup>63</sup> See, for instance, decisions coram Agustoni, April 16, 1975, in E.I.C., 31(1975), pp. 343-347; coram De Jorio, October 15, 1975, in E.I.C., 33(1977), pp. 163-168; coram Pompedda, November 22, 1976, unpublished, Prot. No. 11.086.

Agustoni, while he stops short of outrightly rejecting the notion of consortium vitae, is extremely skeptical of the

impression that it will not be the formulations of the new code of canon law which will determine the outcome of the question, but on-going canonical studies and the jurisprudence of the Roman Rota.

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63 (cont'd) practice of considering the inability to effect a matrimonial "intercomunicabilità" a reason for nullity. De Jorio, on the other hand, acknowledges that for a valid marriage there is required a certain capacity to form an "interpersonal relationship"; but he is wary of over-extending the juridical application of the notion. One reads in Pompedda's decision, *in iure*, No. 8:

"Concillii Vaticani II doctrina de matrimonio utpote consortio vitae coniugalis adhuc indiget profundiore elaboratione juridica, atque plures coacervat quaestiones, scilicet imprimis 'se l'assise ecumenica abbia indotto delle novità circa il sacramento del matrimonio; ma anche, in secondo luogo, se, supposte quelle novità, certamente esposte non in formule giuridiche, sia consentito all'interprete del diritto dedurre delle applicazioni innovative, ancor prima quindi della promulgazione del nuovo Codice' (M.F. Pompedda, "La giurisprudenza rotale tra jus conditum e jus condendum", in *Problemi e prospettive di diritto canonico*, Brescia, 1977, p. 296); quibus quaestionibus periter ac ceteris connexis haud definite solutis, illegitime sin minus temerarie Iudex ecclesiasticus suas ducet ex commenticia theologica doctrina practicas conclusiones in agendis causis matrimonialibus. Utcumque, id unum asserendum esse videtur, quod nempe contentum seu ambitus seu denique elementa essentialia illius 'consortii' definitis limitibus hucusque omnino carent (cfr. decisio diei 14 aprilis 1975 coram Raad, in una Marianopolitana, num. 13), nec ideo licet absque jactura juris divini naturalis nimis exigere praeter illam mediocritatem quam communis hominum sensus atque universalis ratio sufficientem habet ad capacitatem eliciendi consensus matrimonialis."

## CONCLUSION

Marriage was understood by the Romans to be both a procreative union and a unique partnership in which the spouses were of equal status and shared commonly in the most important aspects of life. This personal dimension (itself not entirely juridical) of the marital society is expressed in the two famous Roman-law definitions of marriage. The definition of the Institutes, that marriage is a virī et vitae mulieris coniunctio, individuum consuetudinem continens, became, with minor alterations, the classical canonico-theological definition of marriage. The definition of Modestinus, that marriage is a consortium omnis vitae, divini et humani iuris communicatio, which was not quite as frequently employed in Christian tradition, expressed even more explicitly than the definition of the Institutes the personal character of the marriage relationship.

The medieval usage of the Roman definitions seldom stressed, and sometimes did not even acknowledge, their "personalistic" content. Today, however, one frequently sees the Romano-canonical terminology being employed in ecclesiastical law and jurisprudence to indicate the personal and affective element of marriage, a use for which the traditional expressions are historically well-suited.



St. Augustine was aware of a personal dimension to marriage, but he did not clearly incorporate the notion in his formulation of the three bona - prolis, fides, sacramentum - which formulation would become of prime importance in the Church's understanding of the juridical nature of marriage. The Augustinian schema, if it did not actually inhibit, did not encourage a canonical consideration of marriage as a personal consortium.

Similarly, the fact that Augustine, along with many of the Church Fathers and practically all later theologians and canonists, saw the begetting and raising of children to be the first purpose of marriage was not conducive to viewing marriage as a consortium omnis vitae. Nevertheless, in the twelfth and especially the thirteenth century the personal side of the conjugal association, for instance mutuum adiutorium and remedium concupiscentiae, was clearly acknowledged and to some extent elaborated. There is little evidence, however, that this aspect of matrimony, the so-called bonum coniugum, was given juridical value by the canonists.

Historically, the most important recognition of the personal dimension of marriage came with the medieval inquiry into the object of matrimonial consent. By the end of the thirteenth century it was commonly acknowledged that the most fundamental element of marriage, the most basic fact consented

to by the contractants, was the "conjugal society" itself, the personal union of man and wife. The "conjugal society" was the source of a number of marital rights and duties, the most important (but not the only one) of these being the ius-debitum to procreative acts. Again, however, it does not appear that the conjugal society was studied and analyzed in such a way as to give it clear legal significance. It was, on the other hand, the potestas in corpus, a more precise and juridically demonstrable element than the consortium vitae itself, which was the more visible canonical factor in marriage.

By the time of the publication of the Codex Iuris Canonici the canonical authors had generally, even in their definitions of marriage, assigned its procreative side a much more predominant role than its societal and personal aspect. The Code of Canon Law itself appeared to see in the ius in corpus the center of the juridical structure of marriage; and this viewpoint was strengthened by magisterial teaching, especially that of Pope Pius XII, and by the commentators of the Code. The "secondary ends" of marriage, identified as mutual aid and the alleviation of concupiscence, were accorded moral value, but were given very little importance with respect to the canonical verification of the existence of a marriage. The moral question of the regulation of

births was frequently seen to be closely related to the "primary purpose" of marriage; and this too may have served as an inhibiting factor to a canonical consideration of the personal values of married life.

The Pastoral Constitution Gaudium et Spes of Vatican Council II was in part a deliberate attempt to emphasize, in contrast with past teaching, the personal dimension of the conjugal union. Gaudium et Spes upheld in no uncertain manner the procreative finality of marriage; but it balanced this with the attention paid to the marital benefits accruing to the spouses themselves. Marriage was described as an "intimate community of conjugal life and love", and mention of a "hierarchy of ends" was studiously avoided.

The committee responsible for formulating the new marriage law of the Church have announced that in accordance with the teaching of Gaudium et Spes the new canons (a) would avoid a statement of a hierarchy of matrimonial ends and (b) would affirm the nature of marriage as "an intimate union of the whole of life" ordered to procreation, and that this "intimate union" would be meant to have canonical value. In its present form the yet-unpromulgated law states that marriage is directed to the "bonum coniugum" as well as to the generation and education of children; and among the canonically

necessary components is the "right to those elements which essentially constitute the communion of life". Thus, marriage as a consortium omnis vitae is now envisaged to be part of the Church's legal ordering of the sacraments.

The consortium omnis vitae has also been given juridical significance within the Roman Rota. The two most visible exponents of the consortium in that tribunal to date have been the Auditors Lucien Anné and J.M. Serrano; and they have been joined by others, particularly Fagiolo, Raad, Di Felice, Lefebvre, and Ewers. But only Anné and Serrano appear to have developed the concept to a significant degree, primarily by their analysis of the interpersonal relationships of the conjugal union.

While there is evidence of a current "wait-and-see" attitude within the Roman Rota, only two Rotal judges, Pinto and Masala, seem to have taken a definite stand against attributing juridical value to the consortium. A sentence written by the late Cardinal D. Staffa of the Apostolic Signatura has also denied the relevance of the notion. The major objections made by the opponents of the consortium omnis vitae are directed to the lack of clarity of the concept, its alleged absence from canonical tradition, and the non-juridical character of the marriage teaching of Gaudium et Spes, one of the chief doctrinal bases for the consortium in the minds of

its proponents.

One of the more striking aspects of the Rotal acceptance of the consortium omnis vitae, the personal element of marriage, has been the avoidance of a positive identification of the essential elements of the consortium itself, that is, which aspects of the personal and familial relationship of the spouses should be considered necessary for the existence of a valid marriage. As far as can be seen, it has not so much been the necessary attitudes or capacities of the spouses for a conjugal relationship which have been subjected to analysis within the Rota as the incapacities of the subjects. This manner of proceeding, a via negativa of sorts, has generally allowed for the presentation of clear medical evidence of pathological conditions and has thus facilitated the finding and evaluation of proofs. However, it does not seem to have contributed significantly to identifying the essential elements of the communio vitae, the consortium.

It may be deduced (from the jurisprudence available) that one who would marry must possess the internal capacity to form at least a minimal "personal relationship" with a partner insofar as the partner is (a) a human person, (b) a member of the other sex, and (c) a potential parent. One sees, however, that more precision would be helpful. If

one's psychological deficiency is such that it makes impossible almost all marital esteem, cooperation, and affection, then a consortium omnis vitae is more or less clearly incapable of being realized; and thus the via negativa as a method of procedure can be used to show that the right to the communio vitae was not given or received. When it comes, however, to determining the extent to which and the positive manner in which the conjugal-personal relationship must be capable of being realized - or must be intended to be realized - one might wish for an exposition of just which categories of marital interchange are required for a valid union.

There have been a few attempts, although apparently none in the Rota itself, to determine some of these elements or categories which should be considered essential. It may well be that the very notion of communio vitae defies the degree of precision which canonists desire (it is sometimes said, for instance, that the consortium is chiefly identifiable in its absence). Nevertheless, those who wish a clearer and more refined concept of the consortium vitae than is presently found in the published Rotal jurisprudence will undoubtedly look forward to further studies on what constitute some of its essential parts.

In conclusion, a question which was posed in the introduction to this study may be addressed. Is there justification for assigning juridical value to the consortium omnis vitae as an element of marriage? From the viewpoints of current Rotal jurisprudence and the proposed new canon law, the answer is clearly affirmative. It seems, at least to this writer, that the objections to the consortium made by a few Rotal judges and the above-cited sentence of the Apostolic Signatura, while pointing to some difficulties and possible abuses attendant upon the legal use of the notion, are not compelling arguments against conceding it canonical value.

From the historical point of view, it has been seen in this study that a consortium omnis vitae was an acknowledged (though not entirely juridical) element of Roman marriage. St. Augustine too recognized the personal aspect of marriage, but he did not give it a central place in his theology. The ecclesiastical writers of the classical age of theology and law saw the bonum coniugum to be part of the finality of marriage, and they taught explicitly that the conjugal society itself was the fundamental object of matrimonial consent; but the same theologians and canonists failed to find a clear place for it in the juridical structure of marriage. One may speculate that the reason was at least partially the question

of proof, one of the factors accounting for the caution with which the Rota has dealt with the consortium vitae in recent years.

The current interest in the consortium omnis vitae represents a more comprehensive approach by jurists to the full reality of marriage. The consortium has had a definite role in the historico-theological consideration of marriage and is now finding a place in law. A past emphasis on procreation coincided with, and perhaps led to, a neglect of certain conjugal rights with respect to the personal relationship of husband and wife. One now sees canonists looking more closely at those personal rights, analyzing them (gradually), while at the same time not neglecting the procreative dimension which has always characterized Catholic marriage theology and law.

If theological tradition is an accurate indication, the consortium of husband and wife may be seen to be the most fundamental natural fact of marriage, more fundamental even than procreation (and maybe partly for this reason more complex and nuanced and resistant to exacting analysis). To the degree that this element can be given juridical precision, to that extent, it seems, will canon law be more capable of reflecting the truth of marriage, that Christian sacrament and "secular reality".

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## SUMMARY

The purpose of this study is to examine the notion of the consortium omnis vitae, the personal dimension of marriage, from a juridical point of view. The investigation focuses upon two aspects of the consortium, its historical precedents and its current status in ecclesiastical law and jurisprudence. The ultimate aim is to suggest an answer to the question whether the consortium omnis vitae merits consideration as a genuinely canonical factor in marriage.

The dissertation examines first the terminology and meaning in Roman law of the expressions currently used to identify the personal side of marriage, as well as the matrimonial theology of St. Augustine to the extent that the latter influenced the subsequent formulations and understanding of the nature of marriage (Chapter I). Next the Scholastic definitions of marriage and conclusions as to the purposes (finality) of matrimony are studied (Chapter II); and this is followed by an examination of the teaching of the theologians and canonists of the same (Scholastic) era regarding the object of matrimonial consent (Chapter III). The historical section of the dissertation concludes with a study of the place given the concept of the consortium omnis vitae by the canonical authors immediately prior to the Code of Canon Law, in the Code itself, and in the subsequent interpretation and elaboration of the stipulations of the

Code by the legal commentators, the jurisprudence, and the Magisterium (Chapter IV).

The current status of the consortium in Church law is studied by tracing the evolution of the statements about marriage in the Pastoral Constitution Gaudium et Spes of Vatican Council II and by examining the formulations and significance of the proposed new matrimonial law (Chapter V). Finally, the post-Conciliar Roman jurisprudence on the juridical nature of marriage as a consortium omnis vitae is analyzed (Chapter VI).

The study concludes, first, that there is ample historical justification for recognizing the notion of a consortium omnis vitae as an element which lies at the very heart of marriage, but which historically was not given specifically juridical significance (although it was clearly acknowledged, from a theological viewpoint, to be a fundamental fact of the marital union). Secondly, the study finds that the consortium omnis vitae is seen, both in the proposed law and in contemporary ecclesiastical jurisprudence, to have juridical value, but that the current stage of development is such that the concept of the consortium presently lacks some canonical precision and clarity. It is a notion in need of further elaboration.